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No. _____ OFFICE OF THE CLERK
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In The
Supreme Court of the United States

JAREK MOLSKI, THOMAS E. FRANCOVICH,
THOMAS E. FRANCOVICH
a Professional Law Corporation,

Petitioners,

v.

EVERGREEN DYNASTY CORPORATION,
D/B/A MANDARIN TOUCH RESTAURANT,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Jarek Molski and his attorney, Thomas E. Francovich, were declared vexatious litigants and precluded from filing further suits under Title III of the Americans with Disabilities Act, 42 U.S.C. §12101, et seq., or under state laws, without prior approval of the United States District Court for the Central District of California. This sanction was imposed based on the number of prior lawsuits that they had filed complaining of places of public accommodation not being accessible to those with disabilities, even though their District Court and the Ninth Circuit recognized that most (if not all) of the prior suits were meritorious. This sanction was imposed by the District Court without an evidentiary hearing ever being held to determine whether any, let alone many or most, of the prior suits had been frivolous or contained false allegations. This decision thus raises the question:

Whether a federal district court may deem a litigant or an attorney to be vexatious litigants and preclude the filing of future lawsuits without express permission from the district court when there was no determination that the prior lawsuits were meritless and no evidentiary hearing to ascertain whether the prior suits were frivolous or contained false allegations.

PARTIES TO THE PROCEEDING

Petitioner Jarek Molski was the plaintiff in the action below and Thomas E. Francovich (and Thomas E. Francovich a Professional Law Corporation) was his attorney. They were parties to the proceedings below, and subject to the court order being challenged in this petition. They were appellants in the United States Court of Appeals for the Ninth Circuit.

Evergreen Dynasty Corporation, d/b/a Mandarin Touch Restaurant, was the defendant in the district court proceedings and appellee in the United States Court of Appeals for the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Thomas E. Francovich a Professional Law Corporation has no parent corporation and no publicly listed company holds more than 10% of its stock.

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OPINIONS BELOW

The order of the United States District Court for the Central District of California declaring Jarek Molski and Thomas Francovich "vexatious litigants" and precluding them from filing further lawsuits under Title III of the Americans with Disabilities Act without prior permission of the court is reported at 347 F.Supp.2d 860 (C.D. Cal. 2004) and is reprinted at App. 71. The order of the United States District Court for the Central District of California dismissing this lawsuit is reported at 385 F.Supp.2d 1042 (C.D. Cal. 2005) and is reprinted at App. 39.

The decision of the United States Court of Appeals for the Ninth Circuit affirming the District Court's orders is reported at 500 F.3d 1047 (9th Cir. 2007) and is reprinted at App. 1.

Finally, the Order of the United States Court of Appeals denying rehearing and rehearing en banc is reported at 521 F.3d 1215 (9th Cir. 2008) and is reprinted at App. 91. Nine judges on the Ninth Circuit, including Chief Judge Kozinski, dissented from the denial of en banc review and their opinion is included with this Order.

STATEMENT OF JURISDICTION

The Ninth Circuit's order denying the petition for en banc review, with nine judges of that court dissenting, was issued on April 7, 2008 (and modified on

April 22, 2008). This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

The All Writs Act, 28 U.S.C. §1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

Jarek Molski, along with co-plaintiff Disability Rights Enforcement, Education Services: Helping You Help Others ("DREES"), a non-profit corporation, sued Mandarin Touch Restaurant and Evergreen Dynasty Corporation for violating Title III of the Americans with Disabilities Act, 42 U.S.C. §12101, et

seq., which prohibits discrimination against individuals with disabilities in places of public accommodation. The plaintiffs also raised state law claims. The plaintiffs sought injunctive relief, attorneys' fees and costs, and damages. Molski was represented by Thomas Francovich.

Shortly after the defendants answered the complaint, Mandarin Touch and Evergreen Dynasty filed a motion for an order (1) declaring Molski a vexatious litigant; (2) requiring Molski to obtain the court's permission before filing any more complaints under the ADA; and (3) imposing monetary sanctions against Molski and his attorney, Frankovich. In a published order, the district court granted the motion in part, declaring Molski a vexatious litigant and granting the defendants' request for a pre-filing order. *Molski v. Mandarin Touch Rest.*, 347 F.Supp.2d 860, 868 (C.D. Cal. 2004). App. 71.

Three months later, the district court issued a published memorandum decision regarding that order to show cause. *See Molski v. Mandarin Touch Rest.*, 359 F.Supp.2d 924 (C.D. Cal. 2005). The district court imposed a pre-filing order on the Frankovich Group similar to the order that it had imposed on Molski. On August 31, 2005, the district court, in a third published order, granted the defendants summary judgment on Molski's ADA claim and dismissing the lawsuit. *Molski v. Mandarin Touch Rest.*, 385 F.Supp.2d 1042 (C.D. Cal. 2005). App. 39.

On September 13, 2005, Molski and DREES filed their notice of appeal. On August 31, 2007, the United States Court of Appeals for the Ninth Circuit affirmed the orders of the District Court. 500 F.3d 1047 (9th Cir. 2007). App. at 1. On April 7, 2008, the Ninth Circuit denied rehearing and rehearing en banc. Nine judges of the court, including Chief Judge Alex Kozinski, dissented from the denial of en banc review. App. 91.

STATEMENT OF FACTS

Jarek Molski is paralyzed from the chest down and is confined to a wheelchair. He frequently travels and often is forced to deal with restaurants and other public accommodations that are not equipped to accommodate individuals with disabilities, despite federal and state laws requiring such accommodations. His response is often to sue such establishments to ensure their compliance with the law. He has filed about 400 lawsuits in the federal courts within the districts in California.

Molski's amended complaint alleged that he stopped at the Mandarin Touch Restaurant in Solvang, California on January 25, 2003. After finishing his meal, Molski decided to use the restroom. Molski was able to pass through the narrow restroom door, but there was not enough clear space to permit him to access the toilet from his wheelchair. Molski then exited the restroom, and in the course of doing so, got

his hand caught in the restroom door, "causing trauma" to his hand.

Asserting claims under the ADA and California law, Molski, along with co-plaintiff Disability Rights Enforcement, Education Services: Helping You Help Others ("DREES"), a non-profit corporation, sought injunctive relief, attorneys' fees and costs, and damages. Specifically, the complaint sought "daily damages of not less than $4,000/day . . . for each day after [Molski's] visit until such time as the restaurant is made fully accessible" as well as punitive damages and pre-judgment interest. The amended complaint named as defendants Mandarin Touch Restaurant, Evergreen Dynasty Corp., and Brian and Kathy McInerney.[1]

The defendants answered the complaint, but then filed a motion to have Molski and his counsel, Thomas Francovich, declared vexatious litigants and to require prior court approval for them to file further complaints in federal court under the Americans with Disabilities Act or state law. The District Court granted this motion.

The District Court held no evidentiary hearing. Chief Judge Kozinski, in his dissent from the denial of en banc review, describes the procedure followed by the District Court in coming to its conclusion:

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[1] The claims against Brian and Kathy McInerney were dismissed below and they are no longer parties to this proceeding.

> [T]he docket indicates (somewhat misleadingly) that a "hearing" was held on the vexatious litigant motion, but it plainly was not an evidentiary hearing. What happened instead is this: The judge spent the first half of the hearing berating Molski and his lawyers, in pretty much the same terms as his subsequent order – which suggests that his views were cast in cement by the time of the "hearing." Compare Excerpts of Record (ER) 1094 ("After examining plaintiff's extensive collection of lawsuits. . . ."), and ER 1097 ("The Court simply does not believe that Molski suffered 13 identical injuries generally to the same part of his body, in the course of performing the same activity, over a five-day period."), with *Mandarin Touch Restaurant*, 347 F.Supp.2d at 864 ("After examining Plaintiff's extensive collection of law suits. . . ."), *and id.* at 865 ("The Court simply does not believe that Molski suffered 13 nearly identical injuries, generally to the same part of his body, in the course of performing the same activity, over a five-day period."). After the judge was done, Molski's counsel was allowed to address the court, ER 1102-06, but no witnesses testified, no evidence was presented, there was no cross-examination and there were no evidentiary rulings – in short, there was no trial. Molski, whose veracity the district court impugned, was not even present.

App. 104-05.

Instead, the District Court focused on the number of lawsuits that Molski and Francovich had filed and the fact that the complaints in these cases were essentially identical. The district court first noted that Molski had an extensive history of litigation. 347 F.Supp.2d at 864. The District Court concluded that the allegations in Molski's numerous and similar complaints were "contrived and not credible." *See id.* The court stressed that Molski often filed multiple complaints against separate establishments asserting that Molski had suffered identical injuries at each establishment on the same day. *Id.* at 865. The district court pointed out that Molski had filed thirteen separate complaints for essentially identical injuries allegedly sustained during one five-day period in May 2003. In particular, Molski had alleged that, at each establishment, he injured his "upper extremities" while transferring himself to a non-ADA-compliant toilet. *See id.* at 864-65. The district court said that it "simply [did] not believe that Molski suffered 13 nearly identical injuries." *Id.* Relying on its inherent power to levy sanctions, the district court ordered that the Frankovich Group, as presently constituted, and as it may hereafter be constituted, including shareholders, associates and employees, is required to file a motion requesting leave of court before filing any new complaints alleging violations of Title III of the Americans with Disabilities Act in the United States District Court for the Central District of California.

Although the District Court precluded Molski and Francovich from filing further lawsuits for disability discrimination without the permission of the court, it never found that any of the lawsuits were meritless or frivolous. Quite the contrary, both the Ninth Circuit and the District Court acknowledged that most of Molski's claims and Francovich's suits were meritorious. 500 F.3d at 1062 ("We acknowledge that Molski's numerous suits were probably meritorious in part – many of the establishments he sued were likely not in compliance with the ADA."); *Molski v. Mandarin Touch Rest.*, 347 F.Supp.2d 860, 865 (C.D. Cal. 2004) ("It is possible, even likely, that many of the businesses sued[by Molski] were not in full compliance with the ADA.") The District Court concluded that the orders were justified because of the number of prior lawsuits that Molski and Francovich had filed and what it believed to be false allegations in the complaints.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE STATES AND CIRCUITS AND AN ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER AN INDIVIDUAL OR AN ATTORNEY MAY BE DECLARED A "VEXATIOUS LITIGANT" AND PRECLUDED FROM FILING FURTHER LAWSUITS WITHOUT COURT PERMISSION IN THE ABSENCE OF AN EVIDENTIARY HEARING AND A FINDING THAT THEY HAD FILED NON-MERITORIOUS LAWSUITS.

This case squarely and clearly presents the question of whether and under what circumstances a federal district court may declare a person or a lawyer to be a vexatious litigant and limit their ability to file future lawsuits. Every Circuit has ruled on this and they have articulated different and often conflicting standards. *See, e.g., Copeland v. Green*, 949 F.2d 390 (11th Cir. 1991); *Tripati v. Beaman*, 878 F.2d 351 (10th Cir. 1989); *Martin-Trigina v. Lavien*, 737 F.2d 1254 (2d Cir. 1984); *In re Oliver*, 682 F.2d 443 (3d Cir. 1982); *Green v. Warden*, 699 F.2d 364 (7th Cir. 1983); *In re Green,* 669 F.2d 779 (D.C. Cir. 1981); *In Re Hartford Textile Corp.*, 659 F.2d 299 (2d Cir. 1981), *cert. denied,* 455 U.S. 1018 (1982); *Green v. White*, 616 F.2d 1054 (8th Cir. 1980); *Harrelson v. United States*, 613 F.2d 114 (5th Cir. 1980); *Gordon v. United States Department of Justice*, 558 F.2d 618 (1st Cir. 1977); *Graham v. Riddle*, 554 F.2d 133 (4th Cir. 1977). There

are countless district court decisions considering whether an individual is a vexatious litigant and considering restrictions on the filing of future lawsuits.

Never, however, has this Court considered the circumstances and procedures which permit a district court to declare an individual or a lawyer a vexatious litigant and restrict that person's access to the courts. This Court has been emphatic that the First Amendment right to "petition the Government for a redress of grievances" – which includes the filing of lawsuits – is "one of the most precious of the liberties safeguarded by the Bill of Rights." *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (quoting *United Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222 (1967)). Consequently, a determination that a litigant has repeatedly filed frivolous and harassing lawsuits directly implicates his or her First Amendment interest in access to the courts. Indeed, where an individual's use of the courts is declared abusive or baseless, "the threat of reputational harm[,] . . . different and additional to any burden posed by other penalties," is alone sufficient to trigger First Amendment concerns. *See id.* at 530.

Moreover, a restriction on the ability of a litigant or a lawyer to have access to the courts, as was imposed in this case, strikes at the heart of due process of law. This Court has explained that "[t]he due process clause requires that every man shall have the protection of his day in court." *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). Thus, this Court has observed

that access to the courts is "the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

In the absence of guidance from this Court, the Circuits have adopted conflicting approaches to determining whether a person can be deemed a vexatious litigant. The most important disagreement – and one that is squarely presented in this case – is whether a district court must find that the prior lawsuits were frivolous and without merit in order to issue an order precluding further lawsuits. Several Circuits have expressly held that a litigant may be limited in filing future lawsuits only if there is an express finding that he or she had filed frivolous suits. For example, in *Procup v. Strickland*, 792 F.2d 1069 (11th Cir. 1986) (en banc), the Eleventh Circuit allowed restrictions on the ability of a pro se litigant to bring suits without any attorney. The Court of Appeals stressed that the individual, a prisoner serving a life sentence, had "engaged in ridiculously extensive litigation," having filed 176 cases. The Court of Appeals stressed that "most have been frivolous." *Id.* at 1070.

Likewise, the Third Circuit has allowed restrictions on litigants' access to the courts only on a finding that the individual had filed a significant number of meritless lawsuits. *In re Oliver*, 682 F.2d 443 (3rd Cir. 1982). The Third Circuit has ruled that a judge should not in any way limit a litigant's access to the courts absent "exigent circumstances, such as a

litigant's continuous abuse of the judicial process by filing meritless and repetitive actions." *Brow v. Farrelly*, 994 F.2d 1027, 1038 (3d Cir. 1993). The Fourth Circuit has cited this test approvingly and applied it, requiring a finding of frivolousness to justify limiting the filing of lawsuits. *Cromer v. Kraft Foods North America, Inc.*, 390 F.3d 812, 818 (4th Cir. 2004) (noting the finding that the litigant had filed "frivolous" suits).

In sharp contrast, other Circuits have held that a finding of frivolousness is not a requirement in order to impose restrictions on the filing of further lawsuits. The Second Circuit has declared that a history of litigation entailing "vexation, harassment and needless expense to [other parties]" and "an unnecessary burden on the courts and their supporting personnel" is enough. *Matter of Hartford Textile Corp.*, 681 F.2d 895, 897 (2d Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983).

The Second Circuit has articulated a five-part test for determining whether a litigant may be restricted in filing further lawsuits. *Safir v. United States Lines, Inc.*, 792 F.2d 19, 24 (2d Cir. 1986). The District Court in this case expressly invoked and relied upon this test in prohibiting Molski and Francovich to file further suits without express court permission. 347 F.Supp.2d at 864. App. 79. The Second Circuit's test pointedly excluded any need to find that the prior suits were non-meritorious or frivolous. The five factors in the Second Circuit's test – and used by the District Court in this case – are:

(1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing, or duplicative suits; (2) the litigant's motive in pursuing the litigation, for example, whether the litigant had a good faith expectation of prevailing; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused unnecessary expense to the parties or placed a needless burden on the courts; and (5) whether other sanctions would be adequate to protect the courts and other parties. *Safir*, 792 F.2d at 724.

The Ninth Circuit in this case expressly cited and relied upon the *Safir* test. App. 21. Nowhere did it engage in an analysis of whether Molski's or Francovich's prior lawsuits were frivolous or meritless. Quite the contrary, the Ninth Circuit declared: "We acknowledge that Molski's numerous suits were probably meritorious in part – many of the establishments he sued were likely not in compliance with the ADA." App. 30-31.

Thus, the split among the Circuits could not be clearer. The First, Third, Fourth, and Eleventh Circuits would have required a finding that Molski's and Francovich's prior suits were meritless in order to justify a restriction on future access to the court. Under this standard, the order imposed in this case would not have been allowed. Indeed, another District Court within the Ninth Circuit denied a motion to have Molski declared a vexatious litigant on the ground that his lawsuits were meritorious. *Molski v. Rapazzini Winery*, 400 F.Supp.2d 1208 (N.D. Cal. 2005). But under the standard used by the Ninth

Circuit in this case, and by the Second Circuit, the sanction could be imposed on the litigant and the lawyer without any finding that the suits lacked merit.

A closely related question is procedural in nature: must there be an evidentiary hearing to determine whether the prior suits lacked merit? As Chief Judge Kozinski stressed in his dissent from the denial of en banc review, Molski and Francovich never received any evidentiary hearing to determine whether they had filed non-meritorious suits. App. 105.

Whether such an evidentiary hearing is required is particularly important in this case. The District Court and the Ninth Circuit both concluded that Molski and Francovich had made false factual statements based on the fact that the complaints in many cases contained the same factual allegations. Chief Judge Kozinski stressed the lack of anything in the record of this case, because there had not been an evidentiary hearing, to support this conclusion:

> The bottom line is this: The district court made, and the panel affirms, a finding that Molski is a liar and a bit of a thief, without any evidence at all. The district court and the panel also manage to find that plaintiff just couldn't have suffered the injuries he alleges, without the benefit of an expert or any other proof. But does the district court have authority to make findings that severely curtail access to the federal court, not only for plaintiff but also for his lawyers

> and their other clients (present and future), without swearing in a single witness? Without giving notice and an opportunity to present evidence? Without cross-examination? Without any of the other rudiments of due process? Isn't Molski at least entitled to get on the stand, look the judge in the eye and tell his story?

App. 106.

Moreover, Judge Berzon, in her dissent from the denial of en banc review which was joined by eight other judges, explained that the similarity of the allegations did not show that they were false.

> But the similarity of these injuries alone does not lead to the conclusion that the allegations are patently false. First, as the panel concedes, '[b]ecause many of the violations Molski challenged were similar, it would have been reasonable for Molski's complaints to contain similar allegations of barriers to entry, inadequate signage, and so on.' In addition, Molski provided a reasonable explanation for the similarity of his injuries and the injurious nature of seemingly small acts.

App. 97-98.

There is no dispute that Molski filed a large number of lawsuits against places of public accommodation that were not in compliance with the law and not accessible to individuals with disabilities. Francovich was his attorney in filing many of these

cases. Molski and Francovich saw themselves as playing a key role in enforcing the law. There also is no dispute – and the Ninth Circuit concedes – that most (and maybe all) of their lawsuits had merit. App. 24.

Thus, this case poses a question of national significance – never before faced by this Court – may a litigant and a lawyer have their access to the federal courts drastically limited without a finding that they had filed frivolous or meritless lawsuits and without an evidentiary hearing? This Court should grant certiorari to decide this question of national importance that constantly recurs in trial courts across the country.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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500 F.3d 1047

United States Court of Appeals, Ninth Circuit.

Jarek MOLSKI; Disability Rights Enforcement Education Services: Helping You Help Others, a California public benefit corporation, Plaintiffs-Appellants,

v.

EVERGREEN DYNASTY CORP., d/b/a Mandarin Touch Restaurant; Brian McInerney; Kathy S. McInerney, as joint tenants, Defendants-Appellees.

No. 05-56452.

Argued and Submitted April 17, 2007.
Filed Aug. 31, 2007.

Thomas E. Frankovich and Jennifer L. Steneberg, Thomas E. Frankovich, A Professional Law Corporation, San Francisco, CA, for plaintiff-appellant Jarek Molski and appellant Thomas E. Frankovich, A Professional Law Corporation.

Robert H. Appert, San Gabriel, CA, for defendants-appellees Mandarin Touch Restaurant and Evergreen Dynasty Corporation.

Alan H. Boon and David B. Ezra, Berger Kahn, Irvine, CA, for defendants-appellees Brian McInerney and Kathy McInerney.

Lizbeth V. West, Charles L. Post, and Thadd A. Blizzard, Weintraub Genshlea Chediak, Sacramento, CA, for amici curiae California Restaurant Association, National Federation of Independent Businesses Legal Foundation, California Retailers Association,

California Grocers Association, and California Farm Bureau.

Appeal from the United States District Court for the Central District of California; Edward Rafeedie, District Judge, Presiding. D.C. No. CV-04-00450-ER.

Before: JEROME FARRIS and RONALD M. GOULD, Circuit Judges, and KEVIN THOMAS DUFFY,* District Judge.

PER CURIAM:

This appeal presents two orders of the district court for our review. The first order declared Jarek Molski a vexatious litigant and ordered that Molski obtain leave of the court before filing any claims under Title III of the Americans With Disabilities Act ("ADA") in the United States District Court for the Central District of California. The second order sanctioned the law firm representing Molski, Thomas E. Frankovich, a Professional Law Corporation ("the Frankovich Group"), by requiring it to obtain leave of the court before filing any claims under Title III of the ADA in the Central District of California. We dismiss two of the defendants-appellees from this appeal for lack of jurisdiction. As to the remaining parties, we hold that the district court acted within its sound discretion in entering the pre-filing orders

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* The Honorable Kevin Thomas Duffy, Senior United States District Judge for the Southern District of New York, sitting by designation.

against Molski and against the Frankovich Group, and we affirm the orders of the district court.

I

Molski, who is paralyzed from the chest down, needs a wheelchair to get around. He has filed about 400 lawsuits in the federal courts within the districts in California. Molski lives in Woodland Hills, California, but frequently travels. According to Molski's amended complaint in this case, during his travels, he stopped at the Mandarin Touch Restaurant in Solvang, California on January 25, 2003. After finishing his meal, Molski decided to use the restroom. Molski was able to pass through the narrow restroom door, but there was not enough clear space to permit him to access the toilet from his wheelchair. Molski then exited the restroom, and in the course of doing so, got his hand caught in the restroom door, "causing trauma" to his hand. Molski's amended complaint also alleged that Mandarin Touch contained other accessibility barriers "too numerous to list."

Asserting claims under the ADA and California law, Molski, along with co-plaintiff Disability Rights Enforcement, Education Services: Helping You Help Others ("DREES"), a non-profit corporation, sought injunctive relief, attorneys' fees and costs, and damages. Specifically, the complaint sought "daily damages of not less than $4,000/day . . . for each day after [Molski's] visit until such time as the restaurant is made fully accessible" as well as punitive damages

and pre-judgment interest. The amended complaint named as defendants Mandarin Touch Restaurant, Evergreen Dynasty Corp., and Brian and Kathy McInerney.

Shortly after the defendants answered the complaint, Mandarin Touch and Evergreen Dynasty filed a motion for an order (1) declaring Molski a vexatious litigant; (2) requiring Molski to obtain the court's permission before filing any more complaints under the ADA; and (3) imposing monetary sanctions against Molski and his counsel, Thomas E. Frankovich. Defendants Brian and Kathy McInerney did not join the motion. In a published order, the district court granted the motion in part, declaring Molski a vexatious litigant and granting the defendants' request for a pre-filing order. *Molski v. Mandarin Touch Rest.*, 347 F.Supp.2d 860, 868 (C.D.Cal.2004) [hereinafter *Mandarin Touch I*].

In determining that Molski was a vexatious litigant, the district court applied the five factors set forth in the opinion of the United States Court of Appeals for the Second Circuit in *Safir v. United States Lines, Inc.*, 792 F.2d 19, 24 (2d Cir.1986). Those factors are: (1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing, or duplicative suits; (2) the litigant's motive in pursuing the litigation, for example, whether the litigant had a good faith expectation of prevailing; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused unnecessary expense to the parties or placed a needless burden on the

courts; and (5) whether other sanctions would be adequate to protect the courts and other parties. *Id.*

The district court first noted that Molski had an extensive history of litigation. *Mandarin Touch I,* 347 F.Supp.2d at 864. While acknowledging that the fact that a plaintiff has filed a large number of suits, standing alone, does not warrant a pre-filing order, the district court noted that a large volume of suits might indicate an intent to harass defendants into agreeing to cash settlements. *Id.* The district court also noted that Molski's complaints were all textually and factually similar. *Id.* While again not entirely dispositive, the district court surmised that boilerplate complaints might indicate an intent to harass defendants. *Id.*

Against this background, the district court's reasoning made clear that the most important consideration was its specific finding that the allegations in Molski's numerous and similar complaints were "contrived and not credible." *See id.* The court stressed that Molski often filed multiple complaints against separate establishments asserting that Molski had suffered identical injuries at each establishment on the same day. *Id.* at 865. The district court pointed out that Molski had filed thirteen separate complaints for essentially identical injuries allegedly sustained during one five-day period in May 2003. *Id.* In particular, Molski had alleged that, at each establishment, he injured his "upper extremities" while transferring himself to a non-ADA-compliant toilet. *See id.* at 864-65. The district court

explicitly found that, in making these duplicitous injury claims, Molski had "plainly lied" in his filings to the court because the district court "simply [did] not believe that Molski suffered 13 nearly identical injuries, generally to the same part of his body, in the course of performing the same activity, over a five-day period." *Id.* at 865, 867.

Applying the second *Safir* factor, the district court concluded that Molski's motivation in bringing numerous suits alleging both violations of the ADA and California state civil rights laws was to extract cash settlements from defendants. *Id.* at 866-67. Although the ADA grants private plaintiffs like Molski only the rights to seek injunctive relief, attorneys' fees, and costs, the California state civil rights laws amplify the scope of relief available under federal law by also permitting the recovery of money damages. *Compare* 42 U.S.C. §§ 2000a-3(a), 12188(a)(1), *with* Cal.Civ.Code §§ 51(f), 52(a), 54(c), 54.3(a); *see also Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 606-07 (N.D.Cal.2004) (discussing the remedies available under California law). The district court acknowledged that raising multiple claims in one suit is, in and of itself, not vexatious. *Mandarin Touch I*, 347 F.Supp.2d at 866. However, because Molski had tried on the merits only one of his approximately 400 suits and had settled all the others, the district court concluded that Molski's consistent approach was to use the threat of money damages under California law to extract cash settlements and move on to his next case. *Id.*

Applying the third factor from *Safir,* the district court found that Molski had been represented by counsel in every suit he filed. *Id.* The court wrote that "courts are generally protective of *pro se* litigants," but reasoned that "this same protection does not apply to litigants represented by counsel," and concluded that this factor also weighed in favor of issuing a pre-filing order. *Id.*

Under the fourth *Safir* factor, the district court determined that the large number of vexatious claims Molski had filed had placed an undue burden on the courts. *Id.*

Finally, applying the fifth factor from *Safir,* the district court found that the only effective way to protect the courts and other parties from future vexatious litigation by Molski was by entering a pre-filing order. *Id.* Accordingly, the district court held that, "[b]efore filing any new litigation alleging violations of Title III of the ADA in the United States District Court for the Central District of California, Molski [must] file a motion for leave to file a complaint." *Id.* at 868. The court required that Molski "submit a copy of this order and a copy of the proposed filing with every motion for leave." *Id.*

In the same order, the district court denied the motion of Evergreen Dynasty and Mandarin Touch for sanctions as pre-mature. *Id.* Finally, the district court issued an order to show cause why it should not impose a pre-filing sanction on Molski's attorneys, the Frankovich Group. *Id.* at 867.

About three months later, the district court issued a published memorandum decision regarding that order to show cause. *See Molski v. Mandarin Touch Rest.*, 359 F.Supp.2d 924 (C.D.Cal.2005) [hereinafter *Mandarin Touch II*]. The district court imposed a pre-filing order on the Frankovich Group similar to the order that it had imposed on Molski. *Id.* at 926. In its decision, the district court first observed that in 2004 the Frankovich Group filed at least 223 nearly identical lawsuits in the Northern and Central Districts of California, that the complaints all stated an ADA claim and the same four claims under California state law, that the damages requested in each case were identical and that, other than superficial alteration of the names and facts, the complaints were textually identical down to the typos. *Id.* The district court also noted that plaintiffs represented by the Frankovich Group would often file multiple complaints regarding similar or identical injuries sustained at multiple establishments on a single day. *See id.* at 926-27. The district court noted that one-third of the suits were against ethnic restaurants and commented that "such establishments are seen as easy prey for coercive claims." *Id.* at 926.

Supplementing its findings from its decision accompanying the pre-filing order entered against Molski, the district court found that the Frankovich Group had filed sixteen lawsuits on Molski's behalf alleging injuries sustained over a four-day period from May 20, 2003 to May 23, 2003, all alleging that Molski suffered injuries to his upper extremities as a

result of transfers or negotiating barriers. *Id.* at 928. The district court also noted that, on thirty-seven occasions in 2004 alone, Molski alleged that he had been injured two or more times on the same day. *Id.* On nineteen occasions, Molski alleged that he had been injured three or more times in one day. *Id.* And, on nine occasions in 2004, Molski alleged that he suffered four or more injuries in one day. *Id.*

Additionally, the district court discussed what it characterized as an "astonishing" letter the Frankovich Group had sent to defendants in at least two cases after suing them. *See id.* at 928. The letter described itself as "friendly advice" and counseled the unrepresented defendant against hiring a lawyer. *Id.* The letter warned that a defense attorney would embark on a "billing expedition" and that the defendant's money would be best spent on settlement and remediation of the ADA violations, rather than hiring a defense attorney. *Id.* The letter also advised the defendant that its insurance policy might cover the claim. *Id.* Finally, the letter advised the defendant that it had no bona fide defense to the lawsuit. *Id.*

Relying on its inherent power to levy sanctions, the district court ordered

> that The Frankovich Group, as presently constituted, and as it may hereafter be constituted, including shareholders, associates and employees, is required to file a motion requesting leave of court before filing any new complaints alleging violations of Title III of the Americans with Disabilities Act in

> the United States District Court for the Central District of California. Such a motion must include a copy of this order.

Id. at 926.

As the basis for its sanction, the court first emphasized the ethics rules violations contained in the letter discussed above. *Id.* at 929. For example, the letter offered legal advice to an unrepresented party whose interests conflicted with the interests of the Frankovich Group's clients. *Id.* (citing Model Rules of Prof'l Conduct R. 4.3).

Next, the district court found that many of the claims of bodily injury in complaints filed by the Frankovich Group were "contrived." *Id.* at 930. The court found in particular that "the rate of physical injury defies common sense," noting that the plaintiffs alleged similar injuries sustained in a similar fashion at different businesses on the same day. *Id.* The court noted that the similar injuries did not excuse the existence of accessibility barriers, but that its finding that the injury claims were contrived was "merely a recognition of the fact that reasonable people, once injured, tend to take affirmative steps to avoid similar physical injuries, rather than repeat that same activity 400 times (or five times in the same day)." *Id.* at 931.

The district court also criticized the practice of the Frankovich Group of waiting one year before filing their complaints, in order to maximize the damages threatened and to intimidate the small

businesses against whom the Frankovich Group frequently filed its suits. *Id.* at 932.

Finally, the district court found that the high settlement rate in cases brought by the Frankovich Group, coupled with the volume of cases filed, showed a pattern of extortion. *Id.* at 933-34.

In addition to imposing a pre-filing order on the Frankovich Group, the district court requested that the California state bar investigate the Frankovich Group's practices and consider disciplinary action. *Id.* In the same order, the district court dismissed the plaintiffs' state law claims, declining to exercise supplemental jurisdiction over them. *Id.* at 937.

On August 31, 2005, the district court, in a third published order, granted the defendants summary judgment on Molski's ADA claim for lack of standing. *Molski v. Mandarin Touch Rest.*, 385 F.Supp.2d 1042, 1044 (C.D.Cal.2005). Because Molski's ADA claim was the final claim remaining in the case, the district court also entered an order dismissing with prejudice the plaintiffs' case in its entirety. *Id.* at 1048. (The district court had already dismissed DREES's ADA claim for lack of standing in an unpublished order filed on February 9, 2005.)

On September 13, 2005, Molski and DREES filed their notice of appeal. The notice provided that the plaintiffs were appealing four rulings of the district court: (1) the December 2004 order declaring Molski a vexatious litigant; (2) the February 2005 order dismissing DREES's ADA claim for lack of standing;

(3) the March 2005 order sanctioning the Frankovich Group;[1] and (4) the August 2005 order granting the defendants summary judgment on Molski's ADA claim for lack of standing and dismissing the case.

II

We first address whether the appeal of the pre-filing orders is timely. 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A) provide that the notice of appeal in a civil case must be filed with the district court clerk within thirty days after the judgment or order appealed from is entered. If a party does not file a notice of appeal within the prescribed time limits, we have no jurisdiction to hear the case. *Bowles v. Russell,* ___ U.S. ___, 127 S.Ct. 2360, 2363-64, 168 L.Ed.2d 96 (2007).

Under 28 U.S.C. § 1291, parties may appeal to this court only "final decisions" of the district courts. A final decision is one that "ends the litigation on the

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[1] In the notice of appeal and in their brief to this court, the Frankovich Group characterizes the order entered against it as an order declaring it a "vexatious litigant." The Frankovich Group characterizes the order in this fashion likely because we have held that "an attorney appearing on behalf of a client cannot be sanctioned as a vexatious litigant; by definition, he or she is acting as an attorney and not as a litigant." *Weissman v. Quail Lodge, Inc.,* 179 F.3d 1194, 1197 (9th Cir.1999). However, the district court's order is an order imposing sanctions. In its order, the district court repeatedly refers to its inherent power to levy sanctions against attorneys who abuse the litigation process. *See Mandarin Touch II,* 359 F.Supp.2d at 928-29.

merits and leaves nothing for the court to do but execute the judgment." *Cunningham v. Hamilton County,* 527 U.S. 198, 204, 119 S.Ct. 1915, 144 L.Ed.2d 184 (1999) (internal quotation marks omitted); *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945). Neither party disputes that the August 31, 2005 order dismissing the case was an appealable final decision. However, the McInerneys argue that the December 2004 pre-filing order entered against Molski and the March 2005 pre-filing order entered against the Frankovich Group were also final decisions and therefore immediately appealable. They maintain we must dismiss the appeal because the notice of appeal, filed on September 13, 2005, was filed more than thirty days after the entry of the pre-filing orders. Conversely, Molski and the Frankovich Group argue that the only final decision in this case is the district court's August 31, 2005 order dismissing the plaintiffs' case in its entirety and that, because they filed a notice of appeal within thirty days of the entry of that order, their appeal is timely.

The appeal of the Frankovich Group is timely under the Supreme Court's decision in *Cunningham* and our subsequent decision in *Stanley v. Woodford,* 449 F.3d 1060 (9th Cir.2006). In *Cunningham,* the Supreme Court held that an order imposing sanctions on an attorney pursuant to Federal Rule of Civil Procedure 37(a)(4) was not an immediately-appealable "final decision." 527 U.S. at 200, 119 S.Ct. 1915. In *Stanley,* we extended *Cunningham* and held

that we do not have jurisdiction to entertain interlocutory appeals of district court orders sanctioning attorneys pursuant to the district court's inherent power to levy sanctions.[2] *Stanley,* 449 F.3d at 1065. In this case, the district court entered the pre-filing order against the Frankovich Group under its inherent sanctioning power. *Mandarin Touch II,* 359 F.Supp.2d at 928. Because the Frankovich Group could not immediately appeal the pre-filing order entered against it, and because it filed its notice of appeal within thirty days of the district court's August 31, 2005 order dismissing the entire case, its appeal is timely.

Molski's appeal is also timely. As a general matter, a district court order imposing sanctions on a party is not appealable before the entry of a final judgment. *See Riverhead Sav. Bank v. Nat'l Mortg. Equity Corp.,* 893 F.2d 1109, 1113 (9th Cir.1990); *Johnny Pflocks, Inc. v. Firestone Tire & Rubber Co.,* 634 F.2d 1215, 1216 (9th Cir.1980). However, we have not previously and specifically addressed whether pre-filing orders entered against vexatious litigants are immediately-appealable final decisions. As far as

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[2] Prior to *Cunningham,* we had permitted interlocutory appeals of sanctions orders entered against attorneys. *See, e.g., Telluride Mgmt. Solutions, Inc. v. Telluride Inv. Group,* 55 F.3d 463, 465 (9th Cir.1995); *Reygo Pac. Corp. v. Johnston Pump Co.,* 680 F.2d 647, 648 (9th Cir.1982); *see also Stanley,* 449 F.3d at 1063 (noting that "*Cunningham* effectively overruled earlier Ninth Circuit decisions allowing immediate appeal by attorneys from orders imposing sanctions").

we can tell, no other circuit has considered this question either. We begin with the general presumption that "an appeal ordinarily will not lie until after final judgment has been entered in a case." *Cunningham,* 527 U.S. at 203, 119 S.Ct. 1915. For vexatious litigant orders to be appealable immediately, then, those orders would have to fall within the small category of decisions in which appeal is grounded on the collateral order doctrine which permits immediate appeal of orders that are conclusive and that cannot be effectively reviewed on the appeal of the final judgment. *Swint v. Chambers County Comm'n,* 514 U.S. 35, 42, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995).

As we see it, pre-filing orders entered against vexatious litigants are not conclusive and can be reviewed and corrected (if necessary) after final judgment. Though during the pendency of the appeal, the order might delay or prohibit a litigant from filing claims without leave of court, we have the authority to vacate the order entirely if we conclude the order was unjustified on the merits. *Johnny Pflocks,* 634 F.2d at 1216. Moreover, allowing immediate appeals of pre-filing orders would permit piecemeal appeals and result in a costly succession of appeals from the district court's rulings before entry of final judgment. *Firestone Tire & Rubber Co v. Risjord,* 449 U.S. 368, 374, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981). We see no good reason to part ways from our case law holding that sanctions orders entered against a party are not

immediately appealable, and we hold that pre-filing orders entered against vexatious litigants are also not immediately appealable. Because Molski filed his notice of appeal within thirty days of the district court's August 31, 2005 order dismissing the plaintiffs' entire case, Molski's appeal is timely.

III

Before we address the merits of the pre-filing orders, we must address a second jurisdictional issue. Brian and Kathy McInerney ask us to dismiss them from this appeal because they were not parties to the motion that led to the pre-filing orders entered against Molski and the Frankovich Group. Because Article III limits our jurisdiction to "cases" and "controversies," we dismiss appeals as moot when "the parties lack a cognizable interest in the outcome of the suit." *H.C. v. Koppel,* 203 F.3d 610, 612 (9th Cir.2000); *see City of Erie v. Pap's A.M.,* 529 U.S. 277, 287, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000); *Powell v. McCormack,* 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). As noted above, the plaintiffs initially appealed four rulings of the district court: the two pre-filing orders and the two orders dismissing Molski and DREES's claims for lack of standing. However, in their briefs, Molski and the Frankovich Group limit their arguments to the two pre-filing

orders entered against them.[3] The McInerneys were not a party to the motion that led to the pre-filing orders that now form the sole basis of the appeal in this case. *See Mandarin Touch I,* 347 F.Supp.2d at 861. The McInerneys thus have no cognizable interest in whether we affirm or vacate the pre-filing orders, and there is no justiciable dispute between the McInerneys and Molski and the Frankovich Group. We dismiss Brian and Kathy McInerney from this appeal for lack of jurisdiction.

IV

We next address whether the district court erred in declaring Molski a vexatious litigant and in entering a pre-filing order against him. Two district courts in our circuit disagree about whether Molski's frequent litigation is vexatious. In this case, the Central District of California deemed Molski a vexatious litigant. *See Mandarin Touch I,* 347 F.Supp.2d at 868. However, the Northern District of California has denied a motion to declare Molski a vexatious litigant in that district. *See Molski v. Rapazzini Winery,* 400

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[3] In their reply brief, Molski and the Frankovich Group state:

> Since the filing of their Notice of Appeal, appellants have narrowed the issues for appeal, and through their opening brief seek this Court's review of two of the lower court's orders – the order deeming appellant Jarek Molski a vexatious litigant and the order imposing a pre-filing petition sanction on appellant Thomas E. Frankovich, A Professional Law Corporation.

F.Supp.2d 1208, 1212 (N.D.Cal.2005). We review a pre-filing order entered against a vexatious litigant for abuse of discretion. *De Long v. Hennessey,* 912 F.2d 1144, 1146 (9th Cir.1990). A district court abuses its discretion when it bases its decision on an incorrect view of the law or a clearly erroneous finding of fact. *United States v. Finley,* 301 F.3d 1000, 1007 (9th Cir.2002); *Does 1-5 v. Chandler,* 83 F.3d 1150, 1152 (9th Cir.1996).

The All Writs Act, 28 U.S.C. § 1651(a), provides district courts with the inherent power to enter pre-filing orders against vexatious litigants. *Weissman v. Quail Lodge Inc.,* 179 F.3d 1194, 1197 (9th Cir.1999). However, such pre-filing orders are an extreme remedy that should rarely be used. *De Long,* 912 F.2d at 1147. Courts should not enter pre-filing orders with undue haste because such sanctions can tread on a litigant's due process right of access to the courts. *Cromer v. Kraft Foods N. Am., Inc.,* 390 F.3d 812, 817 (4th Cir.2004); *Moy v. United States,* 906 F.2d 467, 470 (9th Cir.1990); *see also Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 429, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (noting that the Supreme Court "traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances"); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1336.3, at 698 (3d ed.2004). A court should enter a pre-filing order constraining a

litigant's scope of actions in future cases only after a cautious review of the pertinent circumstances.

Nevertheless, "[f]lagrant abuse of the judicial process cannot be tolerated because it enables one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants." *De Long,* 912 F.2d at 1148; *see O'Loughlin v. Doe,* 920 F.2d 614, 618 (9th Cir.1990). Thus, in *De Long,* we outlined four factors for district courts to examine before entering pre-filing orders. First, the litigant must be given notice and a chance to be heard before the order is entered. *De Long,* 912 F.2d at 1147. Second, the district court must compile "an adequate record for review." *Id.* at 1148. Third, the district court must make substantive findings about the frivolous or harassing nature of the plaintiff's litigation. *Id.* Finally, the vexatious litigant order "must be narrowly tailored to closely fit the specific vice encountered." *Id.*

The district court in this case did not apply the factors we outlined in *De Long.* Instead, the district court looked to Second Circuit case law for guidance, applying that circuit's vexatious litigant standard as outlined in *Safir. See Mandarin Touch I,* 347 F.Supp.2d at 863-64. Molski argues that the district court erred by structuring its analysis around the *Safir* factors rather than the factors we have identified.

One district court in our circuit has correctly observed that the *Safir* factors "have never been

adopted by the Ninth Circuit." *Doran v. Vicorp Rests., Inc.*, 407 F.Supp.2d 1115, 1117 n. 3 (C.D.Cal.2005); *see also Wilson v. Pier 1 Imports (US), Inc.*, 411 F.Supp.2d 1196, 1198 (E.D.Cal.2006) (noting that the Ninth Circuit has developed a vexatious litigant standard separate from *Safir*). However, the Second Circuit's standard is not irreconcilable with our standard, but rather can be viewed as a tool for analyzing some of the factors we set forth in *De Long*, insofar as *Safir* and *De Long* in substance cover much of the same ground. As we noted above, we held in *De Long* that district courts considering imposing a pre-filing order on a vexatious litigant should consider four factors. The first two requirements, (1) notice and an opportunity to be heard and (2) the creation of an adequate record, are procedural considerations – that is, the factors define "[a] specific method or course of action" that district courts should use to assess whether to declare a party a vexatious litigant and enter a pre-filing order. *Black's Law Dictionary* 1241 (8th ed.2004). The latter two factors, requiring (3) findings of frivolousness or harassment and (4) that the order be narrowly tailored to prevent the litigant's abusive behavior, are substantive considerations – that is, the factors help the district court define who is, in fact, a "vexatious litigant" and construct a remedy that will stop the litigant's abusive behavior while not unduly infringing the litigant's right to access the courts.

The Second Circuit, by contrast, has instructed district courts, in determining whether to enter a pre-filing order, to look at five factors:

> (1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties.

Safir, 792 F.2d at 24. These five factors are substantive in that they all address whether a party is a vexatious litigant and whether a pre-filing order will stop the vexatious litigation or if other sanctions are adequate. The Second Circuit has held that district courts should use the five *Safir* factors to answer the ultimate substantive issue in resolving a motion for a pre-filing order: "whether a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties." *Id.*; *see also Cromer,* 390 F.3d at 818 (using the *Safir* factors to "determin[e] whether a pre-filing injunction is substantively warranted").

Thus, the Second Circuit's five-factor standard provides a helpful framework for applying the two substantive factors (factors three and four) of our own four-factor standard. *See Rapazzini Winery,* 400 F.Supp.2d at 1210 ("The *Safir* test[']s examination of history of litigation, motive, and needless burden [is]

useful in determining whether the current filings are frivolous and the question of whether other sanctions are adequate [is] similar to the Ninth Circuit's requirement that any pre-filing order be narrowly tailored."). While we structure our analysis here around the four factors we outlined in *De Long*, it was not reversible error for the district court to structure its analysis around the similar factors identified by the Second Circuit.[4]

The first factor under *De Long* is whether Molksi [sic] was given notice and an opportunity to be heard before the district court entered the pre-filing order. This is a core requirement of due process. *De Long*, 912 F.2d at 1147. In this case, Molski had fair notice of the possibility that he might be declared a vexatious litigant and have a pre-filing order entered against him because the district court's order was prompted by a motion filed by the defendants and served on Molski's counsel. Also, Molski had the opportunity to oppose the motion, both in writing and at a hearing. *Cf. Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir.2000) (holding, in a case involving sanctions levied against an attorney, that "an opportunity to be heard does not

[4] Because the facts underlying the district court's imposition of the pre-filing order on Molski are undisputed, we could decide the merits of this appeal even if the district court had applied an incorrect legal standard. *See Pullman-Standard v. Swint*, 456 U.S. 273, 292, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); *Kelley v. S. Pac. Co.*, 419 U.S. 318, 331-332, 95 S.Ct. 472, 42 L.Ed.2d 498 (1974).

require an oral or evidentiary hearing on the issue," but instead that "[t]he opportunity to brief the issue fully satisfies due process requirements").

The second factor of the *De Long* standard is whether the district court created an adequate record for review. "An adequate record for review should include a listing of all the cases and motions that led the district court to conclude that a vexatious litigant order was needed." *De Long,* 912 F.2d at 1147. The record before the district court contained a complete list of the cases filed by Molski in the Central District of California, along with the complaints from many of those cases. Although the district court's decision entering the pre-filing order did not list every case filed by Molski, it did outline and discuss many of them. *See Mandarin Touch I,* 347 F.Supp.2d at 864-65. The district court supplemented its findings in *Mandarin Touch I* with a further discussion of Molski's litigation history in *Mandarin Touch II. See Mandarin Touch II,* 359 F.Supp.2d at 927-28. The district court compiled a record adequate for review of its order.

The third factor set forth by *De Long* gets to the heart of the vexatious litigant analysis, inquiring whether the district court made "'substantive findings as to the frivolous or harassing nature of the litigant's actions.'" *De Long,* 912 F.2d at 1148 (quoting *In re Powell,* 851 F.2d 427, 431 (D.C.Cir.1988)). To decide whether the litigant's actions are frivolous or harassing, the district court must "look at 'both the number and content of the filings as indicia' of the

frivolousness of the litigant's claims." *Id.* (quoting *Powell,* 851 F.2d at 431). "An injunction cannot issue merely upon a showing of litigiousness. The plaintiff's claims must not only be numerous, but also be patently without merit." *Moy,* 906 F.2d at 470.

Molski concedes that he has filed numerous claims. However, Molski contends that his suits were not vexatious because they had merit. As the district court observed, it is likely that many of the businesses Molski sued were not in compliance with the ADA. *Mandarin Touch I,* 347 F.Supp.2d at 865. However, while Molski's complaints may have stated a legitimate claim for relief, it was not clearly erroneous for the district court to find that the claims of injury contained in those complaints were patently without merit. Because many of the violations Molski challenged were similar, it would have been reasonable for Molski's complaints to contain similar allegations of barriers to entry, inadequate signage, and so on. However, it is very unlikely that Molski suffered the same injuries, often multiple times in one day, performing the same activities – transferring himself from his wheelchair to the toilet or negotiating accessibility obstacles. Common sense dictates that Molski would have figured out some way to avoid repetitive injury-causing activity; even a young child who touches a hot stove quickly learns to avoid pain by not repeating the conduct. The district court's conclusion that Molski "plainly lied" in making his injury allegations was not clearly erroneous.

In light of the district court's finding that Molski did not suffer the injuries he claimed, it was not clearly erroneous for the district court to conclude that the large number of complaints filed by Molski containing false or exaggerated allegations of injury were vexatious.

The district court's determination that Molski harassed defendants into cash settlements was justified by its findings regarding Molski's litigation strategy. California law provides that a plaintiff who suffers discrimination based on his or her disability may recover up to three times the amount of actual damages for each offense, and that, at a minimum, the plaintiff must recover damages of not less than $4000. Cal. Civ.Code § 52(a). Thus, Molski usually sought damages of not less than $4000 for each day that a facility did not comply with the ADA. Because Molski would often wait to file suit until a full year elapsed since his visit to the defendants' establishments, defendants often faced claims for statutory damages of over one million dollars. While Molski's claim for daily damages might have been legally justified,[5] it was not clearly erroneous for the district

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[5] District courts in our circuit disagree about whether a plaintiff may seek daily damages under California Civil Code sections 52(a) and 54.3(a). *Compare Rapazzini Winery,* 400 F.Supp.2d at 1211 (holding that daily damages are not available under section 52(a)), *and Doran v. Embassy Suites Hotel,* No. C-02-1961, 2002 WL 1968166, at *6 (N.D.Cal. Aug.26, 2002) (holding that daily damages are not available under either section 52(a) or 54.3(a)), *with Botosan v. Fitzhugh,* 13 F.Supp.2d

(Continued on following page)

court to find that Molski's litigation strategy evidenced an intent to harass businesses into cash settlements.[6]

1047, 1051-52 (S.D.Cal.1998) (holding that an allegation that a plaintiff "is being subjected to a discrimination" meant that the plaintiff had been deterred from visiting a public accommodation on a daily basis, and supported a claim for daily damages under sections 52(a) and 54.3(a)); *see also Arnold v. United Artists Theatre Circuit, Inc.*, 866 F.Supp. 433, 439 (N.D.Cal.1994) (suggesting that a plaintiff can claim damages under sections 52(a) and 54.3(a) for each particular occasion of deterrence). We could not find any California court that has spoken on this issue.

[6] We note that there was a substantial disconnect between the magnitude of injuries Molski suffered and the amount of damages he sought to recover. For example, in this case, in a declaration submitted to the district court, Molski admitted that the injury he suffered at Mandarin Touch – scraping his hand on the door frame – was "not a big injury." Nonetheless, Molski claimed damages of "not less than $4,000" for each of the 363 days that elapsed between when he visited Mandarin Touch on January 25, 2003, and when he filed his complaint on January 23, 2004. Molski thus made a damage claim of no less than $1,452,000 on the day he filed his complaint, with that amount growing by the day. Even if Molski could claim statutory minimum damages in an amount far greater than any actual injury he suffered, *see Continental Cablevision, Inc. v. Poll*, 124 F.3d 1044, 1049 (9th Cir.1997) (suggesting that statutory damages do not require proof of injury); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir.1990) (same), Molski's claims of damages far in excess of the injuries he suffered are not entirely irrelevant to determining whether his litigation was vexatious.

By seeking damages of *not less than* $4000 per day, Molski would claim actual damages beyond those to which he was arguably entitled under the California statutes. *See* Cal. Civ.Code §§ 52(a), 54.3(a) (permitting the recovery of actual damages). Also, there existed a possibility that the district court

(Continued on following page)

The district court also did not err when it inferred an intent to harass defendants into settlement from the fact that Molski had tried on the merits only one of his roughly 400 ADA cases and the fact that Molski and the Frankovich Group targeted ethnic restaurants viewed as easy prey for coercive claims.

Frivolous litigation is not limited to cases in which a legal claim is entirely without merit. It is also frivolous for a claimant who has some measure of a legitimate claim to make false factual assertions. Just as bringing a completely baseless claim is frivolous, so too a person with a measured legitimate claim may cross the line into frivolous litigation by asserting facts that are grossly exaggerated or totally false. In an adversary system, we do not fault counsel or client for putting their best arguments forward, and it is likely the unusual case in which a finding of frivolous litigation follows in the train of a legitimate legal claim. It is a question of degree where the line falls between aggressive advocacy of legitimate claims and the frivolous assertion of false allegations.

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would reject the notion that Molski could recover daily damages, *see supra* note 5, and that Molski would be forced to seek, for the most part, actual damages. Additionally, Molski's complaints usually sought punitive damages. In all of those situations, to recover actual or punitive damages, Molski would need to prove a corresponding injury. *Cf. Continental Cablevision, Inc.*, 124 F.3d at 1049; *Six (6) Mexican Workers*, 904 F.2d at 1306. Because he claimed damages far in excess of his actual injuries, his exaggerated claims of damages support a pre-filing order to the extent that he sought to recover more than the statutory minimum of damages.

In this case, the district court, looking at the allegations of hundreds of lawsuits, made a decision that Molski's baseless and exaggerated claims of injuries exceeded any legitimacy and were made for the purpose of coercing settlement. We cannot on this record conclude that the district court's factual determinations were clearly erroneous or that the district court erroneously reached the legal conclusion that Molski's litigation was vexatious.

The fourth and final factor in the *De Long* standard is that the pre-filing order must be narrowly tailored to the vexatious litigant's wrongful behavior. In *De Long,* we held overbroad an order preventing the plaintiff from filing any suit in a particular district court. *De Long,* 912 F.2d at 1148. Likewise, in *O'Loughlin,* we held that an order requiring a plaintiff to show good cause before making any request to proceed in forma pauperis was not narrowly tailored. *O'Loughlin,* 920 F.2d at 618. Also, in *Moy* we held that an order requiring a plaintiff to obtain leave of court to file any suit was overly broad when the plaintiff had only been highly litigious with one group of defendants. *Moy,* 906 F.2d at 470. Here, by contrast, the district court's order is much narrower – it only prevents Molski from filing actions under Title III of the ADA in the Central District of California. The order thus appropriately covers only the type of claims Molski had been filing vexatiously – ADA claims. *Cf. Cromer,* 390 F.3d at 818-19 (vacating a pre-filing order that prevented the plaintiff from making "any and all filings" in the present case and

also enjoined him from making any future filings in any unrelated case in the district court without obtaining permission from the magistrate judge who issued the order); *In re Packer Ave. Assocs.*, 884 F.2d 745, 748 (3d Cir.1989) (vacating as not narrowly tailored a pre-filing order "prohibiting a litigant from ever again filing a document in federal court"). The order also does not prevent Molski from filing any ADA complaints, it merely subjects Molski's complaints to an initial screening review by a district judge. The order is narrowly tailored because it will not deny Molski access to courts on any ADA claim that is not frivolous, yet it adds a valuable layer of protection, which we think was warranted, for the courts and those targeted by Molski's claims. *See Franklin v. Murphy,* 745 F.2d 1221, 1232 (9th Cir.1984).

In summary, we reemphasize that the simple fact that a plaintiff has filed a large number of complaints, standing alone, is not a basis for designating a litigant as "vexatious." *De Long,* 912 F.2d at 1147; *In re Oliver,* 682 F.2d 443, 446 (3d Cir.1982). We also emphasize that the textual and factual similarity of a plaintiff's complaints, standing alone, is not a basis for finding a party to be a vexatious litigant. Accessibility barriers can be, and often are, similar in different places of public accommodation, and there is nothing inherently vexatious about using prior complaints as a template. *See Wilson,* 411 F.Supp.2d at 1196 (stating that uniform instances of misconduct can justify uniform pleadings).

As we discussed above, the ADA does not permit private plaintiffs to seek damages, and limits the relief they may seek to injunctions and attorneys' fees. We recognize that the unavailability of damages reduces or removes the incentive for most disabled persons who are injured by inaccessible places of public accommodation to bring suit under the ADA. *See* Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation,* 54 U.C.L.A. L.Rev. 1, 5 (2006). As a result, most ADA suits are brought by a small number of private plaintiffs who view themselves as champions of the disabled. District courts should not condemn such serial litigation as vexatious as a matter of course. *See De Long,* 912 F.2d at 1148 n. 3. For the ADA to yield its promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA. But as important as this goal is to disabled individuals and to the public, serial litigation can become vexatious when, as here, a large number of nearly-identical complaints contain factual allegations that are contrived, exaggerated, and defy common sense. False or grossly exaggerated claims of injury, especially when made with the intent to coerce settlement, are at odds with our system of justice, and Molski's history of litigation warrants the need for a pre-filing review of his claims.

We acknowledge that Molski's numerous suits were probably meritorious in part – many of the

establishments he sued were likely not in compliance with the ADA. On the other hand, the district court had ample basis to conclude that Molski trumped up his claims of injury. The district court could permissibly conclude that Molski used these lawsuits and their false and exaggerated allegations as a harassing device to extract cash settlements from the targeted defendants because of their noncompliance with the ADA. In light of these conflicting considerations and the relevant standard of review, we cannot say that the district court abused its discretion in declaring Molski a vexatious litigant and in imposing a pre-filing order against him.

V

The final issue in this case is whether the district court erred in imposing a pre-filing order against the Frankovich Group. We review the district court's imposition of sanctions against an attorney for abuse of discretion. *Weissman,* 179 F.3d at 1197; *Yagman v. Republic Ins.,* 987 F.2d 622, 628 (9th Cir.1993). "A district court abuses its discretion in imposing sanctions when it bases its decision 'on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Mark Indus., Ltd. v. Sea Captain's Choice, Inc.,* 50 F.3d 730, 732 (9th Cir.1995) (quoting *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)).

The district court in this case sanctioned the Frankovich Group with a pre-filing order pursuant to

its inherent power to regulate abusive or bad-faith litigation. *Mandarin Touch II,* 359 F.Supp.2d at 928; *see Chambers v. NASCO, Inc.,* 501 U.S. 32, 43-44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *Link v. Wabash R.R. Co.,* 370 U.S. 626, 632, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). "This inherent power derives from the lawyer's role as an officer of the court which granted admission." *In re Snyder,* 472 U.S. 634, 643, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985) (citations omitted). The Supreme Court has cautioned that, because of the potency of attorney sanction orders, courts must exercise their inherent sanctioning authority with restraint and sound discretion. *Chambers,* 501 U.S. at 45, 111 S.Ct. 2123; *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 764, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980).

As a procedural matter, before imposing sanctions on an attorney, the district court must afford the attorney notice and an opportunity to be heard. *Weissman,* 179 F.3d at 1198. As a substantive matter, justifications for imposing a pre-filing sanction on an attorney "include the attorney's willful abuse of the judicial process, bad faith conduct during litigation, or filing frivolous papers." *Id.* (citations and internal quotation marks omitted). Violations of ethics rules can also serve as a ground for imposing sanctions. *See, e.g., Gomez v. Vernon,* 255 F.3d 1118, 1134 (9th Cir.2001); *Erickson v. Newmar Corp.,* 87 F.3d 298, 303 (9th Cir.1996); *see also* C.D. Cal. Local R. 83-3.1.2 (providing that attorneys practicing in the district court must comply with the Rules of Professional

Conduct of the State Bar of California, that any violation of those rules "may be the basis for the imposition of discipline," and that the Model Rules of Professional Conduct of the American Bar Association may also be considered as guidance when disciplining attorneys). Additionally, the sanction imposed must be tailored to curtail the attorney's particular misconduct. *Chambers,* 501 U.S. at 57, 111 S.Ct. 2123; *Support Sys. Int'l, Inc. v. Mack,* 45 F.3d 185, 186 (7th Cir.1995) (per curiam); *Orlett v. Cincinnati Microwave, Inc.,* 954 F.2d 414, 420 (6th Cir.1992).

In this case, the district court afforded the Frankovich Group notice and an opportunity to be heard before imposing its sanction. On December 10, 2004, the district court issued an order to show cause why the court should not impose a pre-filing order on the Frankovich Group for its role in facilitating Molski's litigation. *Mandarin Touch I,* 347 F.Supp.2d at 867. The Frankovich Group responded to the order in writing, and on February 7, 2005, the district court conducted a hearing on the order. These proceedings provided the Frankovich Group the notice and opportunity to be heard that due process requires. *See Pac. Harbor Capital,* 210 F.3d at 1118; *Weissman,* 179 F.3d at 1198.

The district court also did not abuse its discretion in making the substantive determination that a pre-filing order was justified based on the conduct of the Frankovich Group. As discussed above, Molski's complaints repeatedly alleged injuries that the district court found to be contrived and untrue. Also, the

claims of injuries often were inconsistent with the barriers alleged. For example, complaints filed by the Frankovich Group would allege bodily injury suffered as a result of inadequate signage or the lack of an accessible parking space.

In light of the similarity and exaggerated nature of the frequent injuries Molski alleged, we concluded above that the district court's findings regarding the lack of veracity in Molski's complaints were not clearly erroneous and that the district court was within its discretion in imposing a pre-filing order on Molski. When a client stumbles so far off the trail, we naturally should wonder whether the attorney for the client gave inadequate or improper advice. That the Frankovich Group filed numerous complaints containing false factual allegations, thereby enabling Molski's vexatious litigation, provided the district court with sufficient grounds on which to base its discretionary imposition of sanctions. *Weissman,* 179 F.3d at 1198.

The district court also emphasized that the letter that the Frankovich Group sent to the defendants in at least two cases may have violated multiple ethics rules. While we do not rely on the possible ethical violations as a ground for affirming the sanction imposed on the Frankovich Group, we note that Frankovich Group's decision to send letters that many might view as intimidating to unrepresented defendants was, at best, a questionable exercise of professional judgment. The letters gave legal advice to unrepresented parties whose interests conflicted

with the interests of the Frankovich Group, and this advice quite possibly ran afoul of relevant ethical rules. *See* Model Rules of Prof'l Conduct R. 4.3 ("The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."); Model Code of Prof'l Responsibility DR 7-104(A)(2) (providing that "a lawyer shall not . . . [g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client").

Additionally, the letters advised the defendant that it had no bona fide defense to the ADA action, when in fact this might not be true in a particular case. For example, the ADA requires the removal of barriers in certain structures only when "such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv). This possibly false statement of law may have violated ethics provisions regarding a lawyer's candor to third parties. *See* Model Rules of Prof'l Conduct R. 4.1(a) (providing that "[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person"); Model Code of Prof'l Responsibility DR 7-102(A)(5).

The advice that the defendant might have insurance covering the alleged ADA violation might also have violated Model Rule 4.1(a) and Disciplinary Rule

7-102(A)(5) because California courts have held that an insurance company has no contractual duty to defend in an ADA suit alleging that a defendant's facilities were inaccessible. *See Modern Dev. Co. v. Navigators Ins. Co.*, 111 Cal.App.4th 932, 943, 4 Cal.Rptr.3d 528 (2003). But because the district court was within its discretion in sanctioning the Frankovich Group based on the questionable allegations of physical injury in the complaints they filed, we need not rely on the possible ethics rules violations as a ground for affirming the district court's sanction.[7]

Finally, we hold that the district court's pre-filing sanction is sufficiently tailored to combat the Frankovich Group's practice of repetitive litigation based on false allegations of injury. The sanction requires the Frankovich Group to seek leave of the court before filing any more ADA complaints in the Central District of California, and requires that the district court's order in this case accompany the Frankovich Group's motion for leave. Functionally, the sanction ensures that a judge will initially determine whether the factual allegations in future complaints are

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[7] Because we do not need to rely on the possibility of ethical rule violations to sustain the district court's pre-filing order against the Frankovich Group, and we decline to do so, we also do not make an ultimate determination whether or not any ethical rule violations occurred. As a general matter, decisions on whether lawyers have violated their ethical obligations are best made in the context of formal bar association proceedings where procedural due process protects the lawyer's rights while assessing any harm to the public.

colorable. The order will protect against the extracting of possibly unjustified settlements from uncounseled small-business defendants intimidated by the spectre of a federal complaint coupled with a coercive and misleading communication from a law firm. However, the order does not make it impossible for the Frankovich Group to pursue meritorious ADA litigation in the district court. *See Franklin,* 745 F.2d at 1232. Moreover, as far as the evidence before the district court showed, the Frankovich Group only used abusive litigation tactics in connection with litigation under the ADA. The pre-filing order rightly applies only to complaints asserting claims for relief under the ADA. *See De Long,* 912 F.2d at 1148; *O'Loughlin,* 920 F.2d at 618. For these reasons, we hold that the pre-filing order imposed in this case is adequately tailored to punish the past sanctionable conduct of the Frankovich Group, and, more importantly, to protect the courts and the public from any future misconduct by that law firm.[8] Lawyers are

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[8] District courts have broad discretion in fashioning sanctions. *Leon v. IDX Sys. Corp.,* 464 F.3d 951, 961 (9th Cir.2006); *Ritchie v. United States,* 451 F.3d 1019, 1026 (9th Cir.2006); *Falstaff Brewing Corp. v. Miller Brewing Co.,* 702 F.2d 770, 786 (9th Cir.1983) (Wallace, J., dissenting in part). Permissible sanctions when vexatious litigation is encountered may include not only a pre-filing order, but also monetary sanctions or even the ultimate sanction of dismissal of claims. We do not here hold that, if a court encounters vexatious litigation, a pre-filing order is the only permissible form of sanction. Rather, the district court may exercise its sound discretion under the facts presented to choose any appropriate sanction that will punish the

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required to give their clients' interests zealous advocacy, and while the pre-filing order in this case will not stand in the way of advocacy for legitimate claims, it will help to ensure that the services of the Frankovich Group are used in support of valid claims and not as a device to encourage settlement of unwarranted or exaggerated claims. We affirm the district court's order imposing sanctions on the Frankovich Group.

VI

In summary, we dismiss defendants Brian and Kathy McInerney from this appeal for lack of jurisdiction. We affirm the district court's order declaring Molski a vexatious litigant and requiring him to obtain leave of the court before filing another ADA complaint in the Central District of California. We also affirm the district court's order sanctioning the Frankovich Group and imposing a similar pre-filing order on it. Costs are awarded to the appellees.

AFFIRMED IN PART, DISMISSED IN PART.

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past misconduct and prevent the future misconduct of the lawyer or party at issue.

385 F.Supp.2d 1042

United States District Court, C.D. California.
Jarek MOLSKI, Plaintiff,
v.
MANDARIN TOUCH RESTAURANT;
Evergreen Dynasty Corp., a California corporation;
and Brian McInerney and Kathy S. McInerney,
as joint tenants, Defendants.
No. CV 04-0450 ER.

Aug. 30, 2005.

Stephen Yagman, Yagman Yagman & Reichmann, Venice, CA, Thomas E. Frankovich, Thomas E Frankovich Law Offices, San Francisco, CA, for Plaintiff.

Robert H. Appert, Robert H. Appert Law Offices, San Gabriel, CA, Alan H. Boon, Berger Kahn, Irvine, CA, for Defendants.

ORDER DISMISSING CASE FOR LACK OF STANDING

RAFEEDIE, Senior District Judge.

On February 8, 2005, the Court issued an order to show cause why Plaintiff Jarek Molski's claim alleging violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181, et seq., should not be dismissed for lack of standing. On May 18, 2005, the Court issued an order indicating that the Court intended to treat the order to show cause as a motion for summary judgment, citing the extensive factual record submitted. The parties were given the option

of filing additional briefing and exhibits, or standing on their response to the Order to Show Cause. After considering the papers submitted in response to the Order to Show Cause and the order converting the matter to a motion for summary judgment, the Court has concluded that Molski's ADA claim should be dismissed because he lacks standing to pursue the matter.

I. *Factual Background*

Plaintiff Jarek Molski is a resident of Woodland Hills, California. Defendant Mandarin Touch Restaurant is located in Solvang, California, 116 miles from Molski's residence. It is operated by Defendant Evergreen Dynasty Corporation. Evergreen Dynasty leases the Mandarin Touch property from Defendants Brian and Kathy S. McInerney.

Molski's complaint alleges that he ate dinner at the Mandarin Touch on January 25, 2003. After dinner, Molski attempted to use the restroom, but found that the entrance was too narrow. Molski then alleges that, as he was attempting to leave the restroom, his hand became "caught in the exterior door causing trauma to it." It was Molski's first and only visit to the Mandarin Touch as of the date he filed his

lawsuit, January 23, 2004, which was nearly a full year after his visit.[1]

Plaintiff Molski's litigation history has been well documented in the decisions of this and other Courts. The Court takes judicial notice of the facts contained in *Molski v. Mandarin Touch,* 347 F.Supp.2d 860 (C.D.Cal.2004) ("*Molski I*"); *Molski v. Mandarin Touch,* 359 F.Supp.2d 924 (C.D.Cal.2005) ("*Molski II*"); *Molski v. EOS Estate Winery,* No. CV 03-5880-GAF (C.D. Cal. filed Jul. 14, 2005); *Molski v. Hitching Post I Rest.,* No. CV 04-1077-SVW (C.D. Cal. filed May 25, 2005); *Molski v. Arby's Huntington Beach,* 359 F.Supp.2d 938 (C.D.Cal.2005); *Molski v. Kahn Winery,* 381 F.Supp.2d. 1209 (C.D.Cal.2005); and *Molski v. Price,* 224 F.R.D. 479 (C.D.Cal.2004).

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[1] On January 28, 2005, Mr. Molski did return to the Mandarin Touch. For at least two reasons, this does not affect the standing analysis. First, standing is determined at the time the case is filed, and events occurring after that date are immaterial. *Brother v. Tiger Partner, LLC,* 331 F.Supp.2d 1368, 1373-74 (M.D.Fla.2004). Second, Mr. Molski's own declaration establishes that his return cannot be seen as evidence of an intent to return that existed at the time this action was filed. Molski states that his return was motivated by a recent deposition in this case, in which it was represented that the Mandarin Touch had an accessible restroom. Because Mr. Molski did not learn of the restroom until his deposition, one year after the filing of this lawsuit, it cannot be evidence of an intent that existed at the time the lawsuit was filed.

II. *Analysis*

The Plaintiff has the burden of establishing that he has standing to pursue his claims. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To do so, the Plaintiff must first establish that he has suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent," not "conjectural" or "hypothetical." *Id.* at 560, 112 S.Ct. 2130. Second, "there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly trace[able] to the challenged action of the defendant, and not th[e] result [of] the independent action of some third party not before the court.'" *Id.* (alteration in original) (citations omitted). Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision. *Id.* at 561, 112 S.Ct. 2130.

In order to establish an injury in fact sufficient to confer standing to pursue injunctive relief, the Plaintiff must demonstrate a "real or immediate threat that the plaintiff will be wronged again – a 'likelihood of substantial and immediate irreparable injury.'" *City of Los Angeles v. Lyons,* 461 U.S. 95, 111, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). In evaluating whether an ADA plaintiff has established a likelihood of future injury, courts have looked to such factors as: (1) the proximity of the place of public accommodation to plaintiff's residence, (2) plaintiff's past patronage of defendant's business, (3) the definitiveness of

plaintiff's plans to return, and (4) the plaintiff's frequency of travel near defendant. *Arby's,* 359 F.Supp.2d at 947 n. 10. Assuming, arguendo, that Molski has established standing to pursue claims for damages, the Court nonetheless finds that an application of these factors demonstrates that Molski has not established a likelihood of future injury, and thus, lacks standing to pursue injunctive relief under the ADA.

i. *Proximity of Public Accommodation*

As the distance between the plaintiff's residence and the public accommodation increases, the likelihood of future harm decreases. When the distance between the two is significant, especially if it is in excess of 100 miles, courts have consistently held that it weighs against finding a reasonable likelihood of future harm. *E.g., Molski v. Levon Inv.,* No. C03-8437-SVW (C.D. Cal. filed August 24, 2005) (finding that "considerable distance" of 30 miles between Molski's residence and gas station weighed against Molski establishing a likelihood of future harm); *Delil v. El Torito Rest.,* No. C93-3900, 1997 WL 714866, at *3 (N.D.Cal.1997) (holding that a plaintiff failed to establish likelihood of future harm in part because she lived over 100 miles from restaurant); *Brother v. Tiger Partner, LLC,* 331 F.Supp.2d 1368, 1373 (M.D.Fla.2004) (finding plaintiff failed to establish likelihood of future harm in part because he lived 280 miles from hotel); *Hoepfl v. Barlow,* 906 F.Supp. 317, 320 (E.D.Va.1995) (finding plaintiff failed to establish

likelihood of future harm where she had moved to a different state than defendant doctor). *Cf. Parr v. L&L Drive-Inn Rest.*, 96 F.Supp.2d 1065, 1079-80 (D.Haw.2000) (finding that, in a close case, factors including proximity of plaintiff's residence to defendant restaurant tipped scales in his favor).

Here, the Mandarin Touch is in Solvang, some 116 miles from Molski's residence in Woodland Hills. The considerable distance between Molski's residence and the Mandarin Touch weighs against finding a likelihood of future harm.

ii. *Past Patronage of Business*

Where a plaintiff has visited a restaurant only once, the lack of a "history of past patronage seems to negate the possibility of future injury at [that] particular location." *Parr*, 96 F.Supp.2d at 1079. However, in what it described as a "close[ ] case," the *Parr* court nonetheless found that the plaintiff had standing to pursue his ADA claim because the restaurant in question was part of a chain, which the plaintiff frequented, and because the particular franchise at issue was "within a reasonable distance from Plaintiff's residence and along a familiar bus route." *Id.* at 1080; *see also Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1135-39 (9th Cir.2002) (citing *Parr* approvingly in holding that disabled plaintiff had standing to sue grocery store located 70 miles from his residence where (1) the defendant grocery store was part of a chain, at which the plaintiff regularly

shopped; and (2) the defendant grocery store was located near the residence of the plaintiff's grandmother, whom he visited weekly).

Molski had never been to the Mandarin Touch before January 25, 2003. Thus, *Parr's* presumption against future injury would seem to apply unless Molski can show a connection to the establishment similar to those in *Parr* and *Pickern*. He cannot. The Mandarin Touch is not a chain, nor has Molski identified anything unique about the restaurant that sets it apart from the hundreds of other restaurants he has sued. Although Mr. Molski professes to have a penchant for Asian food, that alone does not provide the same sort of connection that a consumer may have with a specific chain of restaurants or other businesses. Molski has patronized (and sued) dozens of Asian restaurants. Nothing distinguishes the Mandarin Touch from this extensive list.

iii. *Plaintiff's Plans to Return*

ADA plaintiffs seeking injunctive relief must demonstrate that they themselves face a real and immediate threat of future harm. *See Parr,* 96 F.Supp.2d at 1079 (citing *Delil,* 1997 WL 714866, at *4). Standing cannot be established "by respondents' mere profession of an intent, some day, to return." *Lujan,* 504 U.S. at 564 n. 2, 112 S.Ct. 2130. To the contrary, where a plaintiff lacks "concrete plans to return," the Court must satisfy itself that the plaintiff's professed intent to return is sincere and supported by

the factual circumstances of the case. *See Parr,* 96 F.Supp.2d at 1079-80. A serial plaintiff's extensive litigation history can undermine his professed intent to return. *Brother,* 331 F.Supp.2d at 1374-75 ("[I]n view of his extensive litigation history, Mr. Brother's professed intent to return to the property is insufficient. Indeed, to satisfy Article III's standing requirements, Mr. Brother has professed an intent to return to all fifty-four of the properties he has sued. This is simply implausible.").

For a variety of reasons, the Court finds that Mr. Molski's litigation history undercuts his credibility and belies an intent to return to the Mandarin Touch. As a result, Mr. Molski's professed intent to return to the Mandarin Touch is insufficient to establish standing.

First, like the plaintiff in *Brother,* Molski uniformly professes an intent to return to each business that he sues. Molski, of course, is a significantly more active litigant, having filed approximately 400 lawsuits, as compared to the 54 filed by Mr. Brother. If it is "simply implausible" that a plaintiff would return to 54 public accommodations, Molski's expressed intent to return to 400 or more businesses spread across the entire state of California is even more questionable. In order to credit Mr. Molski's expressed intent to return, one would have to believe that he had a genuine desire to return to each business he sued. In other words, one would have to believe that not one of the 400 public accommodations offered inadequate service, inferior products, was too

inconvenient, or was otherwise so unsatisfying that Mr. Molski decided that he would never return to the business establishment in question.

Second, Mr. Molski's own track record demonstrates that he rarely returns to the businesses that he sues. On May 24, 2004, Molski testified that, of the businesses he had sued, he had visited "less than 10 percent" on more than one occasion. Not even a favorable settlement could entice Mr. Molski to return; he testified that he had returned to less than one percent of businesses with whom he had reached a settlement. Not surprisingly, the businesses to which he could recall returning were typically those located near his home in Woodland Hills. Although Mr. Molski testified in May 2004, that he intended to return within a six to twelve month period to all the businesses with whom he had recently settled (a total, according to Molski's estimate, of approximately 50 different businesses), as of three months later, he had not returned to any.

Third, Mr. Molski has engaged in a well-established pattern of abusive litigation. In *Molski II*, this Court found that Mr. Molski's lawsuits regularly involved claims of physical injury, even when the allegations of the complaint foreclosed that possibility. 359 F.Supp.2d at 931-32.

Mr. Molski also regularly claims to be acting in the interest of the disabled community, describing himself as a "sheriff" out to improve access. His litigation tactics, however, belie this characterization.

In this case, Mr. Molski's attorney sent a letter to counsel for the Defendants specifically instructing them not to repair the allegedly inaccessible facilities at the Mandarin Touch. "If any modifications are made," the letter threatens, "you will be subject to an action for spoliation of evidence pursuant to California Penal Code § 135."

Ignoring the rather obvious points that such remedial measures are by no means spoliation of evidence, and that, in fact, the law recognizes a strong policy in favor of such repairs, *see* Fed.R.Evid. 407, this letter demonstrates that access for the disabled is not Molski's actual motivation for his lawsuits. Were he truly interested in improving accessibility, he would encourage business owners to perform such remedial measures, not threaten them with criminal prosecutions for doing so. Moreover, the repairs would not effect his ability to pursue his lawsuit for damages. Molski could still testify to the barriers as they existed at the time of his visit and present his expert's report regarding the existence of the barriers. However, repairs would effect Molski in one respect: if there were no continuing violations, it would render moot Molski's claim for injunctive relief under the ADA. *Norman-Bloodsaw v. Lawrence Berkeley Laboratory,* 135 F.3d 1260, 1274 (9th Cir.1998) (case is moot where "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation"); *see also Molski v. Mosby Winery,* No. CV 04-1076-NM (C.D. Cal. filed July 19, 2005) (dismissing ADA claim on mootness

grounds); *Jankey v. Baker's Square Alhambra,* No. CV 04-4826-SJO (C.D. Cal. filed May 9, 2005) (same). Without a federal ADA claim, if the Court declined to exercise supplemental jurisdiction over his pendant state law claims, Molski would be forced to proceed in state court, where he would have to face defendants (and juries) on their home turf. *See Molski II,* 359 F.Supp.2d at 935.

iv. *Frequency of Travel Near Business*

As discussed above, Molski claims to have driven up the California coast between 15-20 times over the past two years, and has gone wine tasting in the Central Coast region on several occasions. During those trips, he "often," though not always, stops in the Solvang area. Even accepting this general assertion, Molski's travel near Solvang is far less frequent than the plaintiffs in *Parr* and *Pickern,* who either lived near the public accommodation in question, or visited the area on a weekly basis. Moreover, according to Mr. Molski's declaration, the contact is often insubstantial, such as stopping for gas or taking a short rest to break up the trip. Such contacts fail to demonstrate a significant connection with the Solvang area.

III. *Conclusions*

The *Parr* case, which both parties rely on in their moving papers, guides the Court's analysis in this matter. The *Parr* court noted that it was a close case, and that "[r]easonable courts could reach different

results," on the issue of whether the plaintiff had established standing. 96 F.Supp.2d at 1079. The facts that Mr. Molski alleges in order to establish standing, however, compare unfavorably to those alleged by the plaintiff in the *Parr* case in almost every respect. Mr. Parr demonstrated a specific connection with the L & L brand, which Mr. Molski has not done with the Mandarin Touch brand. Mr. Parr lived near the restaurant in question, while Mr. Molski lives hours from the Mandarin Touch. Mr. Parr's local bus route took him past the L & L, Mr. Molski's travel near the Mandarin Touch is far less frequent. Finally, and perhaps most importantly, the Court judged Mr. Parr's professed intent to return to the L & L to be sincere, while this Court has serious doubts about Mr. Molski's intent to return to the Mandarin Touch. If Mr. Parr presented a close case on the issue of standing, Mr. Molski falls far short.[2] Accordingly, the Court finds that Mr. Molski has not established standing to pursue injunctive relief against the Mandarin Touch and hereby GRANTS summary judgment in favor of the Defendants and orders DISMISSAL with prejudice of Plaintiff's case in its entirety.

IT IS SO ORDERED.

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[2] For obvious reasons, the Court's decision is narrowly limited to the facts of this case. The analysis would be considerably different if, for example, the Mandarin Touch was located closer to Molski's residence, or if Mr. Molski could demonstrate a more specific and substantial connection to the Mandarin Touch.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail or by telefax or by email, copies of this Order on counsel for the parties in this matter.

359 F.Supp.2d 938

United States District Court, C.D. California, Southern Division.
Jarek MOLSKI, an individual; and Disability Rights Enforcement, Education Services; Helping You Help Others, a California public benefit corporation, Plaintiffs,
v.
ARBY'S HUNTINGTON BEACH; Cambridge Investments LLC, a Delaware limited liability company; Peter Chamie, sole Trustee of the Alfred P. Chamie and Elizabeth Chamie Revocable Trust UDT dated August 14, 1970, Defendants.
No. SA CV 04-0038 CJC.
March 14, 2005.

Stephen Yagman, Marion R. Yagman, Joseph Reichmann, Yagman & Yagman & Reichmann, Venice Beach, Erwin Chemerinsky, Duke Law School, Durham, NC, Thomas E. Frankovich, Thuy Minh-Ha Hoang, Frankovich Group, San Francisco, CA, for plaintiffs.

Joseph M. Parker, David B. Geerdes, Heller, Ehrman, White & McAuliffe, San Diego, CA, for defendants.

MEMORANDUM DECISION DISCHARGING ORDER TO SHOW CAUSE REGARDING SUBJECT MATTER JURISDICTION

CARNEY, District Judge.

I. INTRODUCTION

The issue presented by the Court's Order to Show Cause involves the showing required to establish jurisdiction for a claim under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA").[1]

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[1] On December 27, 2004, the Court, on its own initiative, issued orders to show cause in six matters involving Mr. Molski: *Molski v. Arby's Huntington Beach* (SACV 04-0038 CJC (ANx)), *Molski v. Mexi-Casa Restaurant* (SACV 04-0083 CJC (SSx)), *Molski v. Gardena Bowling Center, Inc.* (SACV 04-0092 CJC (AJWx)), *Molski v. Entertainment Center* (SACV 04-0096 CJC (JWJx)), *Molski v. MGM Pizza Corp.* (SACV 04-1056 CJC (ANx)), and *Molski v. Verma* (SACV 04-1297 CJC (ANx)). In the orders to show cause, the Court requested briefing on why Plaintiffs' Complaints should not be dismissed for lack of subject matter jurisdiction. The Court issued the order in light of the opinion in *Molski v. Mandarin Touch Restaurant,* 347 F.Supp.2d 860 (C.D.Cal.2004). Concerned by the Court's indication in *Mandarin Touch Restaurant* that Mr. Molski's ADA claims in that case may be a sham, used as a pretext to gain access to the federal courts while pursuing state law remedies, this Court was required to ascertain the propriety of its exercise of jurisdiction in cases involving Mr. Molski. On February 28, 2005, the Court held a hearing for the six matters, providing all counsel for Mr. Molski and all counsel for the various defendants the opportunity to present argument. For purposes of evaluating the orders to show cause, the Court considered the arguments of Mr. Molski's counsel collectively and the arguments of counsel for the various defendants collectively. At the conclusion of the hearing, the Court discharged the orders to show cause from the

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The plaintiff in this case, Jarek Molski, is a wheelchair bound paraplegic who alleges he visited Defendants' Arby's Huntington Beach Restaurant ("Arby's") in January of 2003.[2] Mr. Molski alleges he was denied full access to and enjoyment of the restaurant due to architectural barriers. By his own admission, Mr. Molski has filed hundreds of similar lawsuits in federal courts throughout California against other restaurants and places of business. A review of the complaints filed in many of these lawsuits reveals that the facts alleged, the claims presented, and the damages requested are virtually identical.

In response to the Court's Order to Show Cause, Defendants argue Mr. Molski's litigious activities demonstrate that his ADA claim in this case is brought in bad faith. Defendants assert that Mr. Molski did not visit the restaurant to eat and enjoy the food, but instead visited it to manufacture a lawsuit so he could extort a monetary settlement. According to Defendants, the Court should dismiss

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bench. The Court now issues this Order, detailing its reasoning and analysis.

[2] The Complaint in this action named both Mr. Molski and Disability Rights Enforcement, Education Services: Helping You Help Others ("DREES") as Plaintiffs. Although the Court's Order to Show Cause referred to both Plaintiffs, Mr. Molski and DREES, this Order considers only Mr. Molski's satisfaction of the jurisdictional elements and treats him as the only plaintiff. This is because Mr. Molski appears to be the primary plaintiff in this action. Issues regarding DREES' ability to pursue its claims may be raised at a later time.

Mr. Molski's ADA claim for lack of jurisdiction and standing.

The Court, however, cannot dismiss Mr. Molski's ADA claim for lack of jurisdiction and standing at this early stage of the case. There is no legal authority to support the proposition that a District Court can dismiss an ADA claim on jurisdictional and standing grounds because of a plaintiff's motive for visiting a place of public accommodation. It simply does not matter, from a jurisdictional and standing point of view, what Mr. Molski's motivation was for visiting Arby's. All that matters is that Mr. Molski alleges he did visit the restaurant, he was denied full access to and enjoyment of the premises because of architectural barriers, and he would return to the restaurant if those barriers are removed. Mr. Molski clearly has pled these essential allegations in the Complaint he filed in this case. Therefore, regardless of whether Mr. Molski is a vexatious litigant out to extort a monetary settlement from Defendants, or whether he is a sheriff policing Defendants' restaurant to ensure compliance with the ADA, Mr. Molski has properly alleged standing to assert his ADA claim and this Court has jurisdiction over that claim.

II. FACTUAL BACKGROUND

A. MR. MOLSKI'S PROLIFIC LITIGATION HISTORY

Mr. Molski, the self-proclaimed "Sheriff" and an activist, became paralyzed at the age of 18 following a

motorcycle accident and uses a wheelchair for mobility. Molski Decl.[3] ¶ 1; Plaintiffs' Br. 3. Despite obtaining a law degree and two degrees in taxation, Mr. Molski put aside his desire to practice tax law "because of the existence of immense discrimination by public accommodations against disabled persons." Molski Decl. ¶ 4. During law school, while performing legal research to draft a letter to the owners of his rented apartment (which he states was not ADA-compliant), Mr. Molski "discovered that there were many activists who were at the time suing hundreds of public accommodations each year." *Id.* ¶ 9. Three or four years later, Mr. Molski followed suit and began filing "large volumes of lawsuits." Molski Decl. ¶ 9. Mr. Molski admits to having filed 300-400 actions for ADA violations and settling approximately half of them.[4] *Id.* ¶ 14. According to Mr. Molski, his love of

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[3] Mr. Molski's declaration was attached as Exhibit A to Plaintiffs' Request for Judicial Notice, filed with the Court on February 7, 2005. The declaration originally was submitted in response to the Order to Show Cause issued in *Mandarin Touch Restaurant*, CV 04-0450 ER, on January 31, 2005. For purposes of the Court's evaluation of the Order to Show Cause, the Court will accept Mr. Molski's statements in his declaration as true.

[4] According to Defendants, Mr. Molski has filed 392 lawsuits in the United States District Courts for the Northern, Southern, and Central Districts of California, 223 of which were filed in 2004 alone. Of the 392 lawsuits filed by Mr. Molski, 220 have been against restaurants, 51 against wineries and vineyards, 25 against bowling alleys, 35 against banks, 23 against gasoline and automotive stations, and 36 against retail outlets and other types of businesses. Defendants' Br. 1-2. The Court's opinion in *Molski v. Price*, issued August 24, 2004, notes that at

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traveling and "overall drive for life" results in visits to numerous public establishments along the California coast, with Mr. Molski sometimes visiting three restaurants and numerous wineries in one day. *Id.* ¶¶ 11, 15. Mr. Molski states this extensive traveling and enjoyment of life explains his filing of complaints against 13 establishments for virtually identical injuries sustained in a 5-day period. *Id.* ¶ 11. Mr. Molski acknowledges that all the complaints he files describe the same major barriers and injuries. *Id.* ¶ 25. Although asserting that injunctive relief is the primary focus of all settlement negotiations with defendants in the cases he files, Mr. Molski's counsel admits that initial monetary settlement demands in Mr. Molski's cases generally range from $30,000 to $50,000, depending on the amount of incurred attorneys' fees. Plaintiffs' Br. 11.

B. MR. MOLSKI'S COMPLAINT IN THIS CASE

Mr. Molski filed a Complaint against Defendants on January 14, 2004 for violations of the ADA at Arby's. The Complaint alleges Arby's, located in Huntington Beach, California, is a place of "public accommodation" that is owned and/or operated by Cambridge Investments and Peter Chamie. Compl.

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a deposition conducted in that matter, Mr. Molski stated he contemplated filing an additional 200 to 400 ADA cases. *Molski v. Price*, 224 F.R.D. 479, 481 (C.D.Cal.2004).

¶ 7. According to the Complaint, Mr. Molski, a paraplegic who requires use of a wheelchair to travel in public, visited Arby's on January 23, 2003. *Id.* ¶¶ 13; 19. Mr. Molski alleges that during this visit, he was discriminatorily denied access to full and equal enjoyment of the services and accommodations of Arby's because of Defendants' failure to remove architectural barriers. *Id.* ¶ 1. Specifically, according to the Complaint, when Mr. Molski visited Arby's in order to have a late afternoon snack, he discovered that the restaurant did not have a van accessible handicapped spot and there was "no signage." *Id.* ¶ 19-20. Furthermore, Mr. Molski contends a ramp "encroached in the access aisle." *Id.* ¶ 20. After having his snack, Mr. Molski asserts he attempted to use the restroom and, due to excessive door pressure (25 lbs.), he became wedged banging his hands. *Id.* ¶ 21. Mr. Molski also claims he discovered that both the men's restroom and the women's restroom were inaccessible due to a lack of grab bars and turning radius. *Id.* ¶ 22. Mr. Molski asserts he was denied his civil rights and suffered fatigue, stress, strain and pain, physical discomfort, emotional distress, mental suffering, and mental anguish (shame, humiliation, embarrassment, anger, chagrin, disappointment and worry) as a result of Defendants' failure to provide a fully-accessible public facility. *Id.* ¶ 27. Mr. Molski alleges the failure to remove the architectural barriers continues to create and repeatedly exposes him to fatigue, stress and strain. *Id.* ¶ 28. Mr. Molski seeks injunctive relief to require Arby's to be made fully accessible and meet the requirements of the ADA and California law. *Id.*

¶ 32. Mr. Molski also seeks damages for violations of his rights under California law. *Id.* ¶ 34. Mr. Molski asserts he would and will return to Arby's if it is made accessible to persons with disabilities. *Id.* ¶ 42.

III. AT THIS JUNCTURE, THE COURT'S EXERCISE OF JURISDICTION IS APPROPRIATE

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Insurance Co. Of America,* 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Courts have the authority to dismiss actions sua sponte for lack of jurisdiction (*Franklin v. State of Oregon, State Welfare Division,* 662 F.2d 1337, 1342 (9th Cir.1981)) and are required sua sponte to examine jurisdictional issues such as standing (*B.C. v. Plumas Unified School District,* 192 F.3d 1260, 1264 (9th Cir.1999)). This is because

> [n]othing is to be more jealously guarded by a court than its jurisdiction. Jurisdiction is what its power rests upon. Without jurisdiction it is nothing. Especially at a time when the burden of litigation in the federal courts reaches a peak thought improbable only a few years ago, it is imperative that any attempt to impose upon federal jurisdiction by pleadings without legal justification must be vigorously discouraged.

In re Mooney, 841 F.2d 1003, 1006 (9th Cir.1988) (*overruled on other grounds by Partington v. Gedan,* 923 F.2d 686 (9th Cir.1991)).

It is "rudimentary law that '[a]s regards all courts of the United States . . . two things are necessary to create jurisdiction. . . . The Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it*. . . . To the extent that such action is not taken, the power lies dormant.'" *Finley v. United States,* 490 U.S. 545, 548, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989) (emphasis in original) (internal citation omitted). Therefore, for a federal court to exercise jurisdiction, the case must fall within both a statutory grant of jurisdiction and the confines of Article III of the Constitution, the source of all federal judicial power. The scope of the Court's jurisdiction is "not to be expanded by judicial decree." *Kokkonen,* 511 U.S. at 377, 114 S.Ct. 1673 (*citing American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951)). The burden of establishing the appropriateness of the Court's exercise of jurisdiction lies with the party asserting jurisdiction. *Id.* (*citing McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 182-183, 56 S.Ct. 780, 80 L.Ed. 1135 (1936)).

A. MR. MOLSKI DOES NOT PRESENT A SHAM ADA CLAIM THAT IS IMMATERIAL OR WHOLLY INSUBSTANTIAL AND FRIVOLOUS

Where a complaint seeks recovery directly under the Constitution or the laws of the United States, federal courts are obligated to entertain the suit. *Bell v. Hood,* 327 U.S. 678, 681-682, 66 S.Ct. 773, 90 L.Ed.

939 (1946). An exception to the court's mandatory exercise of jurisdiction exists, however, where the alleged claim under a federal statute "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.* at 682-683, 66 S.Ct. 773. The Supreme Court has stated that dismissal of actions on the basis of subject matter jurisdiction is appropriate when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Oneida Indian Nation of N.Y. v. County of Oneida,* 414 U.S. 661, 666, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). In contrast, "[a]ny non-frivolous assertion of a federal claim suffices to establish federal question jurisdiction." *Cement Masons Health and Welfare Trust Fund for Northern California v. Stone,* 197 F.3d 1003, 1008 (9th Cir.1999). Once the court determines a plaintiff's jurisdiction-conferring claims are not frivolous and immaterial, there is no further inquiry regarding the merits of the claim for purposes of jurisdiction. *Hagans v. Lavine,* 415 U.S. 528, 542 n. 10, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974).

Mr. Molski's exercise of this Court's jurisdiction rests on his claim that Defendants violated the ADA, a federal statute, by discriminating against him in a place of public accommodation.[5] Reviewing Mr. Molski's

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[5] Title III of the ADA prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods,

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claim under the ADA, and based on the present record, the Court cannot conclude Mr. Molski's ADA claims are "immaterial and made solely for the purpose of obtaining jurisdiction" or "wholly insubstantial and frivolous." *Bell*, 327 U.S. at 682-683, 66 S.Ct. 773. The ADA claim is an integral part of Mr. Molski's federal complaint. The ADA regulations identified in Mr. Molski's Complaint establish accessibility guidelines to be adhered to by places of public accommodation and the failure to adhere to such guidelines is actionable. Mr. Molski specifically alleges discrimination on the basis of Arby's failure to provide him full and equal access to and enjoyment of the restaurant, a right guaranteed by the ADA.

Contrary to Defendants' assertions, the fact that Mr. Molski has filed hundreds of virtually identical lawsuits throughout the Central District of California alleging violations of the ADA and routinely dismissed such matters in exchange for a monetary

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services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). The ADA defines discrimination to include "a failure to remove architectural barriers" in existing facilities. 42 U.S.C. § 12182(b)(2)(A)(iv). The ADA authorizes injunctive relief for disabled individuals who suffer prohibited discrimination. 42 U.S.C. § 12188(a)(2). The ADA does not permit the recovery of monetary damages by private individuals. *Pickern v. Holiday Quality Foods, Inc.*, 293 F.3d 1133, 1136 (9th Cir.2002). In addition to his claims under the ADA, Mr. Molski also sets forth claims for violations of California disability, health and safety, and unfair business laws.

settlement is irrelevant for purposes of this Court's examination of its own jurisdiction.[6] Similarly irrelevant is the fact that Mr. Molski adds to his Complaint claims pursuant to California law that are redundant to his ADA claim, with the exception that the California claims seek the recovery of significant monetary damages.[7] The Court is aware of no authority that suggests Plaintiff's motivation in filing suit, whether it be recovery of monetary damages under analogous state law and attorneys' fees or forcing public facilities to adhere to the ADA, is a factor to be evaluated by the Court in reviewing its own jurisdiction. Indeed, a rule

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[6] The filing of hundreds of lawsuits by individual plaintiffs is not a matter unique to the Central District of California. As noted by the Court in *Brother v. Tiger Partner, LLC,* from the Middle District of Florida, "it should be emphasized that the system for adjudicating disputes under the ADA cries out for a legislative solution. Only Congress can respond to vexatious litigation tactics that otherwise comply with its statutory framework. Instead of promoting 'conciliation and voluntary compliance,' the existing law encourages massive litigation. . . . This is particularly the case in the Middle District of Florida where the same plaintiffs file hundreds of lawsuits against establishments they purportedly visit regularly. This type of shotgun litigation undermines the spirit and purpose of the ADA." *Brother v. Tiger Partner, LLC,* 331 F.Supp.2d 1368, 1375 (M.D.Fla.2004).

[7] The Court's analysis is limited to the sole issue of whether the Court has jurisdiction to adjudicate the ADA claim. At oral argument, Defendants raised the issue of the Court's exercise of supplemental jurisdiction over Mr. Molski's state law claims. As this issue was not properly briefed or thoroughly argued, the Court does not address it. The parties are, of course, free to re-raise the issue.

requiring the Court to examine plaintiffs' motivations prior to exercising the Court's jurisdiction would run afoul of our system of jurisprudence and place the Court in the compromising position of weighing facts and making credibility determinations at the early pleading stage. In any event, since Mr. Molski has adhered to the statutory framework and has alleged a material, non-frivolous, and substantial violation of federal law, this Court has "a 'virtually unflagging obligation . . . to exercise the jurisdiction given [it].'" *Ankenbrandt v. Richards,* 504 U.S. 689, 705, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992) (*quoting Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)).

B. MR. MOLSKI HAS STANDING TO SEEK INJUNCTIVE RELIEF

"It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons,* 461 U.S. 95, 101, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). Therefore, a plaintiff bringing suit "must demonstrate a 'personal stake in the outcome' in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution" of significant issues. *Id.* (*quoting Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). The concept of standing embodies this limitation on the power of federal courts to adjudicate cases. The

"irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). In addition to the injury being traceable to the challenged action of the defendant (causation), and the injury capable of being redressed by a favorable decision (redressability),[8] the plaintiff must have suffered an injury in fact. *Bird v. Lewis & Clark College,* 303 F.3d 1015, 1019 (9th Cir.2002) (*citing Cantrell v. City of Long Beach,* 241 F.3d 674, 679 (9th Cir.2001)). An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent', not 'conjectural' or 'hypothetical.'" *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130 (internal citations omitted). When seeking injunctive or declaratory relief, a plaintiff seeking to establish standing must demonstrate such an invasion of a legally protected interest along with a "sufficient likelihood that he will again be wronged in a similar way." *Lyons,* 461 U.S. at 111, 103 S.Ct. 1660. This is because "'past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.'" *Id.* at 102, 103 S.Ct. 1660 (*citing O'Shea v. Littleton,* 414 U.S. 488, 495-496, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)). The party invoking federal jurisdiction bears the burden of establishing these elements. *Lujan,* 504

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[8] As they are clearly satisfied, the causation and redressability elements are not at issue in this matter.

U.S. at 561, 112 S.Ct. 2130. At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.* The Court may presume "that the general allegations in the complaint encompass the specific facts necessary to support those allegations." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 104, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

In the context of the ADA's standing requirement for injunctive relief, a plaintiff must allege that a public accommodation has discriminated against him and that there is a "real or immediate threat that the [public accommodation] will again subject [him] to discrimination." *Bird,* 303 F.3d at 1019. This can be done by a plaintiff showing he has encountered (or has knowledge of) barriers at a place of public accommodation and he intends to return to the public accommodation in the future. *Pickern v. Holiday Quality Foods, Inc.,* 293 F.3d 1133, 1137-1138 (9th Cir.2002).

In *Pickern,* the plaintiff, a paraplegic who used a wheelchair, encountered architectural barriers when visiting a market near his grandmother's home. *Id.* at 1135-1136. The plaintiff visited the market a second time, waiting in the parking lot (because of the barriers encountered previously) while his companion went inside to shop. *Id.* at 1136. Plaintiff asserted that although his grandmother (and the market) were 70 miles away from his home, he frequently went to see his grandmother and was a regular customer of the market chain in his own hometown. *Id.* at 1135.

More than one year after his initial visit to the market, the plaintiff filed suit. *Id.* Overturning the District Court's dismissal on statute of limitations grounds, the Ninth Circuit concluded the plaintiff was not required to make the "futile gesture" of attempting to gain access during the statute of limitations period. *Id.* at 1136-1137. Plaintiff continued to suffer an injury by virtue of being deterred access. *Id.* at 1137.Additionally, in analyzing whether the plaintiff satisfied Article III's standing requirement for injunctive relief, the court held that personally encountering some barriers that prohibit access to a public accommodation, coupled with a desire and intention to return to the store if it is made accessible, is sufficient for purposes of standing. *Id.* at 1138. In the words of the Ninth Circuit, the plaintiff "has visited Holiday's Paradise store in the past and states that he has actual knowledge of the barriers to access at the store. [Plaintiff] also states that he prefers to shop at Holiday markets and that he would shop at the Paradise market if it were accessible. This is sufficient to establish actual or imminent injury for purposes of standing."[9] *Id.* at 1138.

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[9] Other cases addressing the standing of ADA plaintiffs seeking injunctive relief have similarly required a plaintiff to show past injury with an intention to return to the public accommodation. *See Steger v. Franco, Inc.*, 228 F.3d 889, 892 (8th Cir.2000), *cited with approval in Pickern* (293 F.3d at 1138) (to show an injury in fact, plaintiffs must "at least prove knowledge of the barriers and that they would visit the building in the imminent future but for those barriers."), *Shotz v. Cates*, 256

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In this case, Mr. Molski's Complaint alleges he suffered injury because he visited Arby's and while there he was deterred from fully using the facility due to Defendants' failure to provide handicapped accessible parking and restrooms. Mr. Molski alleges this caused him emotional and physical harm. Mr. Molski also alleges he was physically harmed when attempting to use the restroom at Arby's because it was not handicapped-accessible. Moreover, in Paragraph 42 of his Complaint, Mr. Molski alleges he would and will return to Arby's if it is made accessible to persons with disabilities. These allegations clearly satisfy Mr. Molski's burden of alleging actual or imminent injury for purposes of standing.[10]

F.3d 1077, 1082 (11th Cir.2001) (plaintiffs did not have standing to pursue injunctive relief to require a courthouse's accessibility because they had not attempted to return to the courthouse and there was no allegation that they intended to do so in the future), *Molski v. Price,* 224 F.R.D. 479, 483 (C.D.Cal.2004) (to establish standing, plaintiff must show he has an intention to return to the service station at issue) and *D'Lil v. Stardust Vacation Club,* 2001 WL 1825832, (E.D.Cal.2001) ("To demonstrate a real threat of future harm, the plaintiff must establish a likelihood of returning to the defendants' premises.").

[10] Defendants contend Mr. Molski has not demonstrated that he faces a real and immediate threat of future harm because Arby's is located 100 miles from Woodland Hills, where Mr. Molski resides, and Mr. Molski does not appear to have attempted to revisit the Arby's restaurant since January of 2003. While such evidence may demonstrate a lack of standing at successive stages in the litigation, it does not do so at the pleading stage. Because the elements for standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same

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Mr. Molski's motivation for visiting Arby's again is not relevant to the legal issue before the Court. What is critical to the Court's inquiry is whether he has alleged he suffered discrimination and because of his intention to return, will suffer discrimination again in the future. This Court agrees with the District Court's observation in *Molski v. Price*: "[t]he Court can find no authority that suggests that, in order to have standing to assert an ADA Title III claim for injunctive relief, a plaintiff must possess an intention to return to the inaccessible public accommodation that is not motivated in any way by advancing his litigation against that public accommodation." *Molski v. Price,* 224 F.R.D. 479, 483 (C.D.Cal.2004). Indeed, even when a plaintiff has visited a public accommodation for the purpose of "surveying which buildings were or were not accessible to him in his

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way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan,* 504 U.S. at 561, 112 S.Ct. 2130. Therefore, at the current pleading stage, when the Court is obligated to accept all material allegations as true, general factual assertions of injury and future harm are sufficient. At successive stages in the litigation, however, Mr. Molski may be required to submit additional evidence to support his standing. The Court notes that in evaluating whether Plaintiff's likelihood of return is sufficient to confer standing at the summary judgment stage, courts have examined factors such as: (1) the proximity of the place of public accommodation to plaintiff's residence, (2) plaintiff's past patronage of defendant's business, (3) the definitiveness of plaintiff's plans to return, and (4) the plaintiff's frequency of travel near defendant. *D'Lil,* 2001 WL 1825832 at *3.

wheelchair," a District Court has found the standing elements satisfied. *Colorado Cross Disability Coalition v. Hermanson Family Ltd. Partnership I,* 1997 WL 33471623 (D.Colo.1997). Regardless of the reasons underlying Mr. Molski's visit to Arby's, he alleges he confronted architectural barriers that precluded him from gaining full access and he will suffer the same discrimination if he re-visits. This is the type of specific injury the ADA was enacted to prevent. While the filing of hundreds of lawsuits may impact Mr. Molski's credibility and the believability of his assertions that he intends to and will return to Arby's (*see, e.g., Rodriguez v. Investco, L.L.C.,* 305 F.Supp.2d 1278 (M.D.Fl.2004)), this is not an issue to be evaluated at the pleading stage.

Mr. Molski has established standing to seek injunctive relief at this early stage of the case. If Mr. Molski's allegations are true, he has suffered and continues to suffer an injury due to Defendants' conduct, and he is threatened with continued harm absent injunctive relief.

IV. CONCLUSION

For the foregoing reasons, the Court's December 27, 2004 Order to Show Cause is hereby discharged.

347 F.Supp.2d 860

United States District Court,
C.D. California.
Jarek MOLSKI, an individual; and
Disability Rights Enforcement Education
Services: Helping You Help Others,
a California corporation,
Plaintiffs,
v.
MANDARIN TOUCH RESTAURANT;
Evergreen Dynasty Corp., a California
corporation; and Brian McInerney and
Kathy S. McInerney, as joint tenants,
Defendants.
No. CV 04-0450 ER.
Dec. 9, 2004.

Thomas E. Frankovich, San Francisco, CA, for Plaintiffs.

Robert H. Appert, San Gabriel, CA, Alan H. Boon, Berger Kahn, Irvine, CA, for Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO DECLARE JAREK MOLSKI A VEXATIOUS LITIGANT AND FOR A PRE-FILING ORDER REQUIRING MOLSKI TO OBTAIN LEAVE OF COURT BEFORE FILING ANY OTHER CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT

RAFEEDIE, Senior District Judge.

Defendant Evergreen Dynasty Corporation, doing business as Mandarin Touch Restaurant,[1] has asked this Court to declare Plaintiff Jarek Molski a vexatious litigant, and to order Molski to obtain leave of court before filing any other claims under the Americans With Disabilities Act. The matter came on for hearing on November 15, 2004, the Honorable Edward Rafeedie presiding. The Court has concluded that a pre-filing order is appropriate for the reasons discussed below.

Statement of Facts

a. *Plaintiff's History of Litigation*

Plaintiff Jarek Molski is a physically disabled individual who relies on a wheelchair for ambulation. Although he resides in Woodland Hills, he has filed

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[1] Brian and Kathy S. McInerney did not join in the Motion for a Pre-Filing Order. For simplicity, this order will refer to Mandarin Touch and Evergreen Dynasty, collectively, as "Defendant."

hundreds[2] of lawsuits in federal courts throughout the state of California.

A review of the cases submitted to this Court reveals that many are nearly identical in terms of the facts alleged, the claims presented, and the damages requested. In virtually every complaint involving a restaurant or winery, Molski initially reports having trouble finding adequate van-accessible parking. Then, almost uniformly, he reports difficulties entering the business, often citing ramps that are too steep, or doors that require more pressure to open than is permitted by law. After entering the business, Molski generally complains that the service counter is too high. Virtually every complaint ends with Molski venturing to the restroom, which inevitably suffers from at least one violation. Molski almost always suffers some injury – typically to the upper extremities – in the process of transferring himself from his wheelchair to the toilet. He also regularly complains of suffering humiliation or other emotional distress from the experience. Molski's prayer for relief routinely includes both a request for injunctive relief and

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[2] Defendant's Memorandum of Points and Authorities asserts that Molski has filed 334 lawsuits in the federal courts since 1998. During the hearing, Plaintiff's counsel stated that Molski had filed approximately 400 suits, and the Court will accept that number. Despite this considerable number of filings, Molski has never litigated a suit on the merits in the Central District of California. The vast majority of his claims settle, with a significant minority dismissed for lack of prosecution or violation of a court order.

damages of $4,000 per day, for each day after his visit until the facility is brought up to ADA standards.

The facts of the instant case are predictably similar. On January 25, 2003, Molski's complaint alleges that he had dinner at the Mandarin Touch Restaurant in Solvang, California. After dinner, Molski attempted to use the restroom, but found that the entrance was too narrow. Molski then alleges that, as he was attempting to leave the restroom, his hand became "caught in the exterior door causing trauma to it." The lawsuit asks for injunctive relief to bring the restaurant up to ADA standards, and damages of not less than $4,000 per day, for each day after his visit until such time as the restaurant is made fully accessible.

b. *The Americans With Disabilities Act*

The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, was signed into law in 1990. Its stated goal is to remedy discrimination against individuals with disabilities.[3] To that end, Title III of

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[3] The ADA states:

It is the purpose of this Act-

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(Continued on following page)

the ADA, 42 U.S.C. § 12181, *et seq.*, requires the removal of structural barriers in existing public accommodations "where such removal is readily achievable."[4] 42 U.S.C. § 12182(b)(2)(A)(iv). *See also* 28 C.F.R. § 36.304 (2004) (listing examples of, and prioritizing, readily achievable repairs). Where removal of the barrier is not readily achievable, the facility must provide access "through alternative methods if such methods are readily achievable." 42 U.S.C. § 12182(b)(2)(A)(v).

To enforce Title III, the ADA contains both a private right of action, 42 U.S.C. § 12188(a), and a right of action for the Attorney General, 42 U.S.C. § 12188(b). While the Attorney General may seek monetary damages on behalf of an aggrieved party, 42 U.S.C. § 12188(b)(2)(B), the only remedies available under the private right of action are injunctive relief and the recovery of attorneys' fees and costs. 42 U.S.C. § 12188(a)(1); 42 U.S.C. § 2000a-3(a). By providing

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> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b).

[4] The ADA defines "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9).

different remedies for public and private enforcement, Congress clearly demonstrated its intent to prevent private plaintiffs from recovering money damages under the ADA. *American Bus Ass'n v. Slater,* 231 F.3d 1, 5 (D.C.Cir.2000) ("By specifying the circumstances under which monetary relief will be available, Congress evinced its intent that damages would be available in no others.").

However, enterprising plaintiffs (and their attorneys) have found a way to circumvent the will of Congress by seeking money damages while retaining federal jurisdiction. Because a violation of the ADA also constitutes a violation of California's Unruh Civil Rights Act, Cal. Civ.Code § 51(f), and the California Disabled Persons Act ("CDPA"), Cal. Civ.Code § 54(c), Plaintiffs can sue in federal court for injunctive relief under the ADA, and tack on state law claims for money damages under the Unruh Act and CDPA. *See, e.g., Moeller v. Taco Bell Corp.,* 220 F.R.D. 604, 607 (N.D.Cal.2004).

The ability to profit from ADA litigation has given birth to what one Court described as "a cottage industry." *Rodriguez v. Investco, L.L.C.,* 305 F.Supp.2d 1278, 1280-81 (M.D.Fla.2004). The scheme is simple: an unscrupulous law firm sends a disabled individual to as many businesses as possible, in order to have him aggressively seek out any and all violations of the ADA. Then, rather than simply informing a business of the violations, and attempting to remedy the matter through "conciliation and voluntary compliance," *id.* at 1281, a lawsuit is filed, requesting

damage awards that would put many of the targeted establishments out of business. Faced with the specter of costly litigation and a potentially fatal judgment against them, most businesses quickly settle the matter.

The result of this scheme is that "the means for enforcing the ADA (attorney's fees) have become more important and desirable than the end (accessibility for disabled individuals)." *Brother v. Tiger Partner, LLC,* 331 F.Supp.2d 1368, 1375 (M.D.Fla.2004). Serial plaintiffs, like Molski, serve as "professional pawn[s] in an ongoing scheme to bilk attorney's fees." *Rodriguez,* 305 F.Supp.2d at 1285. It is a "type of shotgun litigation [that] undermines both the spirit and purpose of the ADA." *Brother,* 331 F.Supp.2d at 1375.[5]

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[5] The *Brother* court expressed serious concerns about the "vexatious litigation tactics" employed by serial ADA plaintiffs, and called upon the Congress to formulate a legislative solution to the problem. 331 F.Supp.2d at 1375. Pending legislative reform, however, "[t]he appropriate mechanism for addressing allegations of such behavior lies with the ethics and disciplinary bodies of State bar associations or with the court where the litigation is pending." *ADA Notification Act: Hearings on H.R. 3590, before the Subcomm. on the Constitution of the House Comm. on the Judiciary* (May 18, 2000), *available at:* http://commdocs.house.gov/committees/judiciary/hju66728.000/hju66728-0.htm.

Analysis

a. *Authority to Issue Pre-Filing Order*

The District Court has the inherent power to levy sanctions in response to abusive litigation practices. *See, e.g., Roadway Express, Inc. v. Piper,* 447 U.S. 752, 765-66, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). This inherent power is augmented by Local Rule 83-8, which empowers this Court to craft an appropriate sanction to defend against vexatious litigation, including, but not limited to, "a directive to the Clerk not to accept further filings from the litigant without payment of normal filing fees and/or without written authorization from a judge of the Court or a Magistrate Judge, issued upon such showing of the evidence supporting the claim as the judge may require."[6] C.D. Cal. Local Rule 83-8.2.

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[6] Local Rule 83-8 also states:

> It is the policy of the Court to discourage vexatious litigation and to provide persons who are subjected to vexatious litigation with security against the costs of defending against such litigation and appropriate orders to control such litigation. It is the intent of this rule to augment the inherent power of the Court to control vexatious litigation and nothing in this rule shall be construed to limit the Court's inherent power in that regard.

C.D. Cal. Local Rule 83-8.1.

b. *Standard for Vexatious Litigant*

In deciding whether or not to restrict a litigant's access to the courts, "[u]ltimately, the question the court must answer is whether a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties." *Safir v. United States Lines, Inc.*, 792 F.2d 19, 23 (2nd Cir.1986). In doing so, the Court should look to five factors: (1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties. *See id.*

1. *Litigant's History of Litigation*

A "vexatious suit" is a "lawsuit instituted maliciously and without good cause." Black's Law Dictionary 1596 (8th ed.2004). After examining Plaintiff's extensive collection of lawsuits, the Court believes that most, if not all, were filed as part of a scheme of systematic extortion, designed to harass and intimidate business owners into agreeing to cash settlements.

The Court bases this determination on several considerations. One is the sheer volume of lawsuits filed by this Plaintiff. Although litigiousness alone is insufficient to justify a restriction on filing activities, *see In re Oliver,* 682 F.2d 443, 446 (3rd Cir.1982), it is a factor the Court considers indicative of an intent to harass. *See De Long v. Hennessey,* 912 F.2d 1144, 1147 (9th Cir.1990) (stating that in order to issue a prefiling order, "[a]t the least, the record needs to show, in some manner, that the litigant's activities were numerous or abusive"). Here, Molski's filing are plainly numerous, and, as discussed throughout this order, abusive as well.

Another consideration is the textual and factual similarity of the complaints filed by Plaintiff. This too, while not dispositive, is a factor the Court considers indicative of an intent to harass, as it suggests that Plaintiff is filing boilerplate complaints. *See In re Powell,* 851 F.2d 427, 431 (D.C.Cir.1988) (stating that "the district court should attempt to discern whether the filing of several similar types of actions constitutes an intent to harass the defendant or the court").

Most important, however, is the Court's conclusion that the allegations contained in Plaintiff's complaints are contrived and not credible. Although it is not obvious when looking at an individual complaint, examining Plaintiff's complaints in the aggregate reveals a clear intent to harass businesses.

For example, in *Molski v. El 7 Mares Restaurant,* Case No. C04-1882 (N.D.Cal.2004), Molski claims

that, on May 20, 2003, he and significant other, Brygida Molski, attended the El 7 Mares Restaurant for the purposes of dining out. Molski alleges that the restaurant lacked adequate handicapped parking, and that the food counter was too high. After the meal, Molski attempted to use the restroom, but because the toilet's grab bars were improperly installed, he injured his shoulders in the process of transferring himself from his wheelchair to the toilet. Thereafter, he was unable to wash his hands because of the lavatory's design.

Although this complaint appears credible standing alone, its validity is undermined when viewed alongside Molski's other complaints. In *Molski v. Casa De Fruta,* L.P., Case No. C04-1981 (N.D.Cal.2004), Molski alleges that he sustained nearly identical injuries on the exact same day, May 20, 2003. In *Casa de Fruta,* Molski alleges that he and significant other, Brygida Molski, patronize Casa de Fruta for the purpose of wine tasting. On arrival, Molski was again unable to locate van accessible parking. Once inside, Molski again found the counter to be too high. After wine tasting, Molski again decided to use the restroom, and again, injured his upper extremities while in the process of transferring himself to the toilet. Thereafter, he was once again unable to wash his hands due to the design of the lavatory.

This was, apparently, not the end of Molski's day. In *Molski v. Rapazzini Winery,* Case No. C04-1881 (N.D.Cal.2004), Molski once again alleges that he sustained nearly identical injuries on the exact same

day, May 20, 2003. Molski, again accompanied by Brygida Molski, claims he visited the Rapazzini Winery for the purpose of wine tasting. Again, Molski complains that the parking lot lacked adequate handicapped van accessible parking. Upon entering the establishment, he discovered that the counter was too high. After tasting wine, he again needed to use the restroom. In the course of transferring himself from his wheelchair to the toilet, he injured himself yet again. Thereafter, he was again unable to wash his hands due to the lavatory's design.

The Court is tempted to exclaim: "what a lousy day!" It would be highly unusual – to say the least – for anyone to sustain two injuries, let alone three, in a single day, each of which necessitated a separate federal lawsuit. But in Molski's case, May 20, 2003, was simply business as usual. Molski filed 13 separate complaints for essentially identical injuries sustained between May 19, 2003 and May 23, 2003. The Court simply does not believe that Molski suffered 13 nearly identical injuries, generally to the same part of his body, in the course of performing the same activity, over a five-day period. This is to say nothing of the hundreds of other lawsuits Molski has filed over the last four years, many of which make nearly identical allegations. The record before this Court leads it to conclude that these suits were filed maliciously, in order to extort a cash settlement.

It is possible, even likely, that many of the businesses sued were not in full compliance with the ADA. However, "[f]or purposes of imposing sanctions

under the inherent power of the court, a finding of bad faith 'does not require that the legal and factual basis for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy, or mala fides, the assertion of a colorable claim will not bar the assessment of [sanctions].'" *Fink v. Gomez,* 239 F.3d 989, 992 (9th Cir.2001) (citations omitted). *See also Vollmer v. Selden,* 350 F.3d 656, 660 (7th Cir.2003) (a non-frivolous filing may be sanctionable if filed for an improper purpose, such as extortion). So, even if the businesses sued by Molski were in violation of the ADA, this fact is outweighed by the Court's finding that he acted in bad faith, for the improper purpose of extorting a settlement. The Court therefore finds that Molski has a considerable history of vexatious litigation. *See Brother,* 331 F.Supp.2d at 1375 (describing a similar pattern of "shotgun" ADA litigation, designed to extort attorneys' fees, as "vexatious litigation").

2. *Litigant's Motive*

The next factor to be considered is the litigant's motive in bringing the lawsuit. Molski claims that his motivation was to obtain injunctive relief, and that the funds recovered were largely used to offset his legal expenses. But this explanation is undercut by his course of action. The ADA itself allows private plaintiffs to sue for injunctive relief, and to recover their attorneys' fees and costs. It does not allow for any award of money damages to a private plaintiff. If Molski's motivation was genuinely to obtain

injunctive relief and recover his legal costs, he could sue entirely under the ADA. But he does not do that. Instead, Molski almost always raises additional state law claims under the CDPA, California Health & Safety Code, the Unruh Civil Rights Act, and California Bus. & Prof.Code § 17200, which allow for the recovery of money damages.

Clearly, raising multiple claims, by itself, is not unethical or vexatious. However, it is consistent with an overall pattern of behavior that demonstrates Molski's motivation is, ultimately, to extract a cash settlement. The threat of significant money damages[7] is a much more effective inducement to settle than merely requesting a court order to make "readily achievable" repairs. And that threat appears to be working. Almost as startling as the sheer number of complaints Molski has filed, is the number of those claims that settle. Of the hundreds of cases Molski has filed in this district, not one has ever been litigated on the merits. The overwhelming majority settle, with a significant minority dismissed for violation of a court order, or failure to prosecute the claim. This not only calls into question Molski's good faith expectation of prevailing on the merits of his

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[7] And the damages requested are quite significant. Molski routinely asks for $4,000 per day, for every day from his visit until the repairs are completed. And Molski often waits a year or more before filing suit. In the instant case, the purported violation took place on January 25, 2003, but the suit was not filed until January 23, 2004. That delay alone would be worth $1,452,000 if Molski received the damages requested.

claim, but also suggests that he does not even have a reasonable expectation (or intention) of litigating the suit on the merits.[8] Molski's m.o. is clear: sue, settle, and move on to the next suit.

3. *Representation By Counsel*

The next factor is whether or not Molski is represented by counsel. Molski has been represented by counsel in every lawsuit that this Court is aware of. Although courts are generally protective of *pro se* litigants, this same protection does not apply to litigants represented by counsel, and thus, this factor also weighs against Plaintiff. *See Iwachiw v. N.Y. City Bd. of Elections,* 273 F.Supp.2d 224, 228 (E.D.N.Y.2003).

4. *Burden on the Courts*

The fourth factor is whether Plaintiff has caused needless expense to other parties or unnecessarily burdened the courts. Because Plaintiff has filed a countless number of vexatious claims, the Court believes this factor plainly weighs against him.

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[8] Additionally, given Molski's considerable history of making questionable claims, a jury could reasonably refuse to credit his testimony. This further weakens the likelihood of Molski prevailing on the merits of his claims.

5. *Adequacy of Other Sanctions*

The final factor is whether sanctions, other than a pre-filing order, could adequately protect the court and other parties. For the reasons already discussed, the Court believes the answer is no. As noted above, Plaintiff's filings appear meritorious when examined individually. Their vexatious nature is revealed only when viewed in the aggregate. Thus, the only effective way to put a reviewing judge on notice of Plaintiff's history is to require Molski to file a copy of this order with every new complaint that he seeks to file. This would allow the reviewing judge to assess whether Molski had raised a bona fide claim of discrimination under the ADA, or whether he was merely bringing another vexatious claim in order to strong arm a business into settling. *See, e.g., In re Billy Roy Tyler,* 839 F.2d 1290, 1293-94 (8th Cir.1988) (per curiam) (holding that a pre-filing order is appropriate where petitioner was able to consistently dress up frivolous claims so that, on the face of the complaint, they appeared to be meritorious).

Conclusions

The Court is convinced that a pre-filing order is justified and necessary to prevent Molski from filing any further vexatious complaints. The Court has no doubt that Molski's "shotgun litigation" tactics "undermine [ ] both the spirit and purpose of the ADA." In addition to misusing a noble law, Molski has plainly lied in his filings to this Court. His claims of

being the innocent victim of hundreds of physical and emotional injuries over the last four years defy belief and common sense.

But Molski has not acted alone. In every action, Molski is aided and abetted by his attorneys, often the Thomas E. Frankovich Law Offices, and his corporate co-Plaintiff, Disability Rights Enforcement Education Services: Helping You Help Others ("DREES").[9] For that reason, this Court is also issuing orders to show cause why the Court should not exercise its inherent power to extend similar sanctions to them, for their role in facilitating Molski's abusive litigation practices.[10]

The Court is also troubled by the fact that Molski raises a federal ADA claim in the federal courts, while seeking a remedy, money damages, exclusively available under state law.[11] Even if proven, the ADA claim

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[9] The Court notes that it has at least one other case currently before it involving DREES and the Frankovich firm. The named plaintiff in that case is Les Jankey. *Jankey v. Yang Chow Restaurant,* CV 03-2239 (C.D.Cal.2003). While less prolific than Molski, the Court's computer docketing program reveals that Jankey has filed 36 claims in the Central District, including 21 cases filed in 2004 alone. In each of these cases, Jankey was represented by the Frankovich firm, and DREES is a co-plaintiff.

[10] The Court will also issue an order to show cause why DREES's claims should not be dismissed for a lack of standing.

[11] Although Molski does seek injunctive relief and attorneys' fees under the ADA, he also requests them as part of his state law claims.

would not entitle Molski to any relief that is not already available under state law. Additionally, the burden of proving an ADA claim is necessarily at least as high as proving a violation to the California statutes, as a violation of the ADA constitutes a prima facie violation of those statutes. Thus, the ADA claims do not extend Molski any benefit in terms of the litigation itself, or the remedies he may seek, other than allowing him to proceed in the federal courts.

For that reason, the Court believes that Molski's ADA claims are a sham, used as a pretext to gain access to the federal courts, while he pursues remedies that are available – sometimes exclusively – under California state law. Therefore, the Court will also issue an order to show cause why Molski's ADA complaint should not be dismissed, and his remaining claims remanded back to state court, for lack of subject matter jurisdiction.

Sadly, Molski is not unique. The Trevor Law Group, and others like it, have achieved infamy in California for carrying out a similar scheme under California's Unfair Business Practices statute, Bus. & Prof.Code § 17200 *et seq.* As one Court described it:

> The abuse is a kind of legal shakedown scheme: Attorneys form a front "watchdog" or "consumer" organization. They scour public records on the Internet for what are often ridiculously minor violations of some regulation or law by a small business, and sue that business in the name of the front organization.

> Since even frivolous lawsuits can have economic nuisance value, the attorneys then contact the business (often owned by immigrants for whom English is a second language), and point out that a quick settlement (usually around a few thousand dollars) would be in the business's long-term interest.

People ex rel. Lockyer v. Brar, 115 Cal.App.4th 1315, 1316-17, 9 Cal.Rptr.3d 844 (2004).

These words could apply, almost verbatim, to the scheme perpetrated by Molski, DREES, and the Frankovich firm. And this Court is not unmindful of the result of the Trevor Law Group's abuse of the Unfair Business Practices statute. In the most recent election, the citizens of California overwhelmingly backed Proposition 64, which greatly limited the private attorney general provision of that law. It is not beyond the realm of belief that the actions of Molski, and those like him, pose a similar threat to the ADA.

Thus, this pre-filing order serves as a bulwark that not only shields the Court and defendants from vexatious litigation, but also protects the "purpose and spirit of the ADA." It does not limit the right of a legitimately aggrieved disabled individual to seek legal relief under the ADA; it only prevents abuse of that law by professional plaintiffs, like Molski, and their lawyers, such as the Frankovich firm, whose priority is their own financial gain, and not "the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

For all of these reasons, the Court finds that Jarek Molski is a vexatious litigant. Before filing any new litigation alleging violations of Title III of the ADA in the United States District Court for the Central District of California, Molski is hereby ordered to file a motion for leave to file a complaint. Molski must submit a copy of this order and a copy of the proposed filing with every motion for leave. This will allow a reviewing judge to assess whether the proposed filing is made in good faith, or is simply another attempt to extort a settlement.

Rule 11 Sanctions

Defendant has also requested sanctions under Rule 11. At this point, the Court has not made any formal determination regarding the merits of the instant case, and as such, Rule 11 sanctions would be premature. The request for sanctions is therefore DENIED.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail or by telefax or by email, copies of this Order on counsel for the parties in this matter.

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521 F.3d 1215

United States Court of Appeals, Ninth Circuit.
Jarek MOLSKI; Disability Rights Enfrocement [sic] Education Services: Helping You Help Others, a California public benefit corporation, Plaintiffs-Appellants,
v.
EVERGREEN DYNASTY CORP., d/b/a Mandarin Touch Restaurant; Brian McInerney; Kathy S. McInerney, as joint tenants, Defendants-Appellees.
No. 05-56452.

April 7, 2008.
As Amended April 22, 2008.

Thomas E. Frankovich, Esq., Thomas E. Frankovich A Professional Law Corporation, San Francisco, CA, Jennifer L. Steneberg, Esq., Law Offices of Thomas E. Frankovich, San Francisco, CA, Stephen Yagman, Esq., Yagman & Yagman & Reichmann, Venice Beach, CA, Jessica A. Dayton, Esq., The Frankovich Group, San Francisco, CA, for Plaintiffs-Appellants.

Robert Appert, San Gabriel, CA, Alan H. Boon, Irvine, CA, for Defendants-Appellees.

Central District of California, Los Angeles, D.C. No. CV-04-00450-ER.

Before JEROME FARRIS and RONALD M. GOULD, Circuit Judges, and KEVIN THOMAS DUFFY,* Senior Judge.

ORDER

All judges on the panel have voted to deny Plaintiff/Appellant's Petition for Panel Rehearing, and so that petition is DENIED.

The full court has been advised of Plaintiff/Appellant's Petition for Rehearing En Banc, and a judge of this court requested a vote on whether this case should be reheard en banc; however, a majority of the non-recused active judges of the court did not vote in favor of en banc consideration. Fed. R.App. P. 35. Accordingly, the Petition for Rehearing En Banc is also DENIED. No further petitions for rehearing or rehearing en banc shall be considered.

Judges Graber and Fisher were recused from considering the en banc issues in this case and did not participate in the court's decision.

BERZON, Circuit Judge, with whom KOZINSKI, Chief Judge, and PREGERSON, REINHARDT, HAWKINS, McKEOWN, WARDLAW, W. FLETCHER, and PAEZ, Circuit Judges, join, dissenting from the denial of rehearing en banc:

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* The Honorable Kevin Thomas Duffy, Senior United States District Judge for the Southern District of New York, sitting by designation

Pre-filing orders infringe the fundamental right to access the courts. They are properly reserved for extreme situations where there is absolutely no possibility that the allegations could support judicial relief *and* filing the suit is a burden on both the court and the opposing party – a costly exercise in futility. Under those circumstances, less draconian sanctions will not suffice. Because, by any measure, this is not such a case, I respectfully dissent from the denial of rehearing en banc.

I.

The First Amendment right to "petition the Government for a redress of grievances" – which includes the filing of law-suits – is "one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE & K Constr. Co. v. NLRB,* 536 U.S. 516, 524, 122 S.Ct. 2390, 153 L.Ed.2d 499 (2002) (quoting *United Mine Workers v. Illinois Bar Assn.,* 389 U.S. 217, 222, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967)). Consequently, a determination that a litigant has repeatedly filed frivolous and harassing lawsuits itself implicates his First Amendment interest in access to the courts. Indeed, where an individual's use of the courts is declared abusive or baseless, "the threat of reputational harm[,] . . . different and additional to any burden posed by other penalties," is alone sufficient to trigger First Amendment concerns. *See id.* at 530, 122 S.Ct. 2390.

Because the right to access the courts implicates due process and First Amendment rights, courts have been exceedingly reluctant to restrict such access. We have noted that because a pre-filing order "restricts an individual's access to the court system, it is an extraordinary remedy that should be narrowly tailored and rarely used." *Moy v. United States,* 906 F.2d 467, 470 (9th Cir.1990). This is so even though litigants and lawyers covered by a pre-filing order are not entirely enjoined from filing suits covered by the order, but must obtain the court's approval first. This pre-clearance requirement is in itself a serious imposition on the right to access the courts: "Among all other citizens, he is to be restricted in his right of access to the courts. As far as he is concerned, his future filings run the risk of delay and even possible rejection before he can call upon defendants to respond to those filings. . . . We cannot predict what harm might come to him as a result, and he should not be forced to predict it either. What he does know is that a Sword of Damocles hangs over his hopes for federal access for the foreseeable future." *Id.*

Because it interferes with the basic right of court access, "[a]n injunction cannot issue merely upon a showing of litigiousness." *Id.* Rather, "[t]he plaintiff's claims must not only be numerous, but also be *patently without merit.*" *Id.* (emphasis added). Other circuits have similarly emphasized the extreme caution to be used in imposing such orders. *See, e.g., In re Powell,* 851 F.2d 427, 434 (D.C.Cir.1988) ("[M]ere litigiousness alone does not support the

issuance of an injunction. Both the number and content of the filings bear on a determination of frivolousness or harassment." (citation and footnote omitted)); *In re Oliver,* 682 F.2d 443, 446 (3d Cir.1982) ("Oliver's litigiousness alone would not support an injunction restricting his filing activities. . . . [L]egitimate claims should receive a full and fair hearing no matter how litigious the plaintiff may be.").

The insistence that potentially meritorious suits, however numerous and similar, cannot be the basis for a pre-filing order has echoes in analogous areas of law that similarly reflect the First Amendment protection accorded court access. Under California law, for example, the California Supreme Court, emphasizing the importance of assuring access to the courts, has repeatedly held that improper motive alone is not sufficient basis for establishing the tort of abuse of process. *See Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.,* 42 Cal.3d 1157, 232 Cal.Rptr. 567, 728 P.2d 1202, 1209 (1986) ("[T]he mere filing or maintenance of a lawsuit – even for an improper purpose – is not a proper basis for an abuse of process action."). The United States Supreme Court has established a similar test in determining when litigation can be enjoined or declared unlawful: "[O]ur holdings [in prior cases] limited regulation to suits that were both objectively baseless *and* subjectively motivated by an unlawful purpose." *BE & K Constr.,* 536 U.S. at 531, 122 S.Ct. 2390 (emphasis in original) (discussing the sanctioning of

litigation under the antitrust laws or as an unfair labor practice under the National Labor Relations Act).

II.

The panel opinion pays lip service to the long-standing and constitutionally-based principle that "[a]n injunction cannot issue merely upon a showing of litigiousness. The plaintiff's claims must not only be numerous, but also be patently with out merit." 500 F.3d 1047, 1059 (9th Cir.2007) (quoting *Moy*, 906 F.2d at 470). Yet, neither the panel nor the district court contend that all or most of Molski's hundreds of ADA claims actually lack merit. In fact, both expressly concede that they are probably meritorious. *Id.* at 1062 ("We acknowledge that Molski's numerous suits were probably meritorious in part – many of the establishments he sued were likely not in compliance with the ADA."); *Molski v. Mandarin Touch Rest.*, 347 F.Supp.2d 860, 865 (C.D.Cal.2004) ("It is possible, even likely, that many of the businesses sued [by Molski] were not in full compliance with the ADA."). Instead, the panel relies on the district court's finding that Molski's "*claims of injury* . . . were patently without merit," and concludes this is enough to make the litigation frivolous. 500 F.3d at 1059 (emphasis added).

As an initial matter, the district court's conclusion that Molski fabricated many allegations of injury, which was affirmed by the panel, simply

cannot meet our standard for factual frivolousness. To be frivolous, factual allegations must be "wholly fanciful" or "conflicting with facts of which the district court may take judicial notice." *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir.1984) (internal quotation marks omitted) (quoting *Crisafi v. Holland*, 655 F.2d 1305, 1307-08 (D.C.Cir.1981) (per curiam)); *see also In re Thomas*, 508 F.3d 1225, 1227 (9th Cir.2007) (importing *Franklin's* factual frivolousness standard to reviewing appeals submitted pursuant to pre-filing orders).

The district court and the panel relied solely upon the similarity and multitude of Molski's injuries: Numerous complaints alleged that he incurred physical injuries while attempting to overcome non-ADA-compliant public accommodations. The panel asserts that "it is very unlikely that Molski suffered the same injuries, often multiple times in one day, performing the same activities – transferring himself from his wheelchair to the toilet or negotiating accessibility obstacles. Common sense dictates that Molski would have figured out some way to avoid repetitive injury-causing activity; even a young child who touches a hot stove quickly learns to avoid pain by not repeating the conduct." 500 F.3d at 1059. On this reasoning, the panel concludes that the district court's finding that Molski "plainly lied" in his injury allegations was not clearly erroneous.

But the similarity of these injuries alone does not lead to the conclusion that the allegations are patently false. First, as the panel concedes, "[b]ecause

many of the violations Molski challenged were similar, it would have been reasonable for Molski's complaints to contain similar allegations of barriers to entry, inadequate signage, and so on." *Id.* In addition, Molski provided a reasonable explanation for the similarity of his injuries and the injurious nature of seemingly small acts. As another district court explained, in rejecting the district court's analysis here and declining to find Molski a vexatious litigant:

> Molski explains that, as a paraplegic, he relies entirely on his upper extremities and the strain of the improper transfers to the toilet are real injuries to him. Even though the pain might be short-lived, the cumulative effect of the multiple injuries is to wear down his upper extremities, joints, and shoulders. Molski also frequently injures his buttocks when forced to transfer to a toilet that is not configured in compliance with the ADA. Molski explains that, because he sits on his buttocks all day, bruises on his buttocks do not heal quickly or easily. . . .
>
> Molski supports the veracity of his claims of injury with a declaration from his treating physician, Dr. Thomas Lyle Hedge. . . . Dr. Hedge declares that Molksi [sic] has suffered "repetitive, continuous and cumulative" trauma/physical injury to the upper extremities from confronting architectural barriers such as unpaved pathways and toilets without proper grab bars or at an improper height.

Molski v. Rapazzini Winery, 400 F.Supp.2d 1208, 1210-11 (N.D.Cal.2005) (record citations omitted). Given this explanation,[1] the factual allegations of injury here were simply not "wholly fanciful," *Franklin,* 745 F.2d at 1228, even if the incremental nature of the alleged injury was not spelled out.

But even if Molski's allegations of injury *were* meritless, the pre-filing order would not be justified: The allegations of injury are entirely irrelevant to Molski's ADA causes of action; past actual injury is not necessary to bring a claim under Title III of the ADA. *Molski v. M.J. Cable, Inc.,* 481 F.3d 724, 730 (9th Cir.2007). Allegations of injury are not necessary either to sue for statutory damages under California's Unruh Act. *Botosan v. Paul McNally Realty,* 216 F.3d 827, 835 (9th Cir.2000). The panel appears to so recognize, but suggests that there are some scenarios under which Molski might want to pursue actual rather than statutory damages under state law, so the allegations of physical injury "are not entirely irrelevant." 500 F.3d at 1060 n. 6. That may be. But the tangential connection of the physical injury allegation to the potential for success in the cases certainly makes it difficult to characterize the complaints as a whole as frivolous in any ordinary sense of that term.

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[1] Molski and Dr. Hedge both submitted declarations in the instant case providing the same explanations accepted in *Rapazinni Winery.*

The panel's other complaints similarly fail to justify a prefiling order. The panel complains that Molski sought daily statutory damages under California law, yet recognizes that these claims "might have been legally justified" because of a split among district courts on the issue. *Id.* at 1060 & n. 5. The panel also relies upon the fact that Molski often waited a year before filing suit, which greatly increased the statutory damages claim. But this conduct is permitted under the statute; if there is a problem created by the statutory scheme, the appropriate fix is legislative, not judicial.

In sum: The panel justifies its ruling by relying on assertedly false claims of injury that would be relevant only under California law and on permissible litigation strategies that increase Molski's damages claim under California law. Not only do these reasons entirely fail to justify the extreme sanction of a pre-filing order, they are also exclusively concerned with Molski's claims under state law. Yet the prefiling order enjoins Molski from filing only *federal ADA claims*. "If we are to permit pre-filing restrictive orders, these orders must be narrowly tailored to closely fit the specific vice encountered." *De Long v. Hennessey,* 912 F.2d 1144, 1148 (9th Cir.1990). At the very least, the pre-filing order should restrict Molski's ability to file access claims only under California law. What we have here, in other words, is not a "close[ ] fit" but a grotesquely oversized pre-filing order, going far beyond the only "vice[s] encountered" in the

complaints, none of which have anything at all to do with the allegations of ADA violations.

III.

I recognize that some of the tactics used by Molski and the Frankovich Group are cause for concern. But there are ample avenues for addressing any concerns raised by this case – avenues that do not involve one judge, acting alone, imposing a pre-filing order that covers an entire district.[2]

Let me emphasize the impact of the district court's decision: *One judge* has determined that Molski and the Frankovich Group are forbidden to file ADA complaints without prior approval in the *entire Central District.* That judge has not in any way specified what standards will be used in deciding which cases may be filed and which may not. Other judges in that district may disagree with the imposition of the pre-filing order – in fact, a majority may. Yet, they have no say at all in the matter. The likelihood of internal disagreement is highlighted by the fact that a judge in the Northern District has determined, on a similar record, that Molski should *not* be subjected to a pre-filing order. *Molski v. Rapazzini Winery,* 400 F.Supp.2d at 1209-12. So Molski can now bring ADA suits in the Northern District seeking to

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[2] Perhaps because of the existence of so many alternative avenues for sanctioning counsel, pre-filing orders have been overwhelmingly, if not exclusively, issued against *pro se* parties.

assure access in places of public accommodation, but cannot do so in the Central District without subjecting himself to prescreening by a single judge.

There are alternative mechanisms for addressing the perception that a litigant or lawyer is engaged in widespread litigation abuse – mechanisms that do not allow one judge, acting alone, to bar the courthouse door in perpetuity. The Central District, like most districts, has detailed procedures to investigate and sanction attorney misconduct. *See* C.D. CAL. LOCAL R. 83-3. This process permits the involvement of multiple judges and members of the bar, rather than the one-judge disciplinary committee presented here. Or, if the conduct of ADA litigation concerns the entire Central District judiciary, the court as a whole can issue a general order setting forth particular guidelines for ADA access cases, as the Northern District has. *See* N.D. CAL. GEN. ORDER 56.

Moreover, Rule 11 is designed to deal on a case-by-case basis with the precise abuse found here: false factual allegations. *See* FED.R.CIV.P. 11(b)(3), (c)(1) (requiring an attorney or unrepresented party to certify that "the factual contentions [contained in a pleading or motion] have evidentiary support" and permitting sanctions on "any attorney, law firm, or party that violated the rule or is responsible for the violation"). As far as I can tell, Rule 11 sanctions have never been imposed on either Molski or the Frankovich Group for their ADA litigation. Surely a lesser sanction in an individual case should first be attempted to cure any offending conduct before a broad

pre-filing order covering all future cases is imposed. *See Lysiak v. CIR,* 816 F.2d 311, 312 (7th Cir.1987) (imposing pre-filing order where "the pattern of baseless litigation generated by Lysiak, even after prior sanction, demonstrates that it would be fruitless simply to impose an additional monetary penalty").

IV.

At bottom, the panel may be uncomfortable with ADA litigation that it suspects is being brought to induce settlement.[3] This concern with serial access litigation is shared by many, rightly or wrongly. But the phenomenon is a creature of our federal and state statutes and cannot justify the issuing of prefiling orders that enjoin meritorious lawsuits. Moreover, while self-interest surely drives serial access litigation in part, the reason there *can* be so many lawsuits about access to public accommodations is that there are so many violations of the laws that seek to assure access, and so many disabled people are thwarted from participating equally in the activities of everyday life. I fear that the panel's opinion may be widely used to restrict critical private enforcement of civil rights laws by other litigants and lawyers. This case

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[3] It is not clear why the settlements are so troubling. Judging by the dozens of settlement agreements in the record, the vast majority of these settlements include provisions for remedying barriers to access – precisely the goal sought by the ADA – as well as small amounts of monetary relief and payment of attorney's fees.

should have been heard en banc to prevent that result.

KOZINSKI, Chief Judge, with whom Judges REINHARDT, W. FLETCHER and PAEZ join, dissenting from the order denying the petition for rehearing en banc:

I agree with Judge Berzon that neither the district court nor our panel had an adequate basis for finding that Molski "plainly lied" about his injuries, or that his "claims of injury . . . were patently without merit." *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1059 (9th Cir.2007); *see Molski v. Mandarin Touch Restaurant,* 347 F.Supp.2d 860, 867 (C.D.Cal.2004). But I do so on an additional ground: The district court had no power to make such findings, nor a record to base them on, because it never held an evidentiary hearing.

Oh, sure, the docket indicates (somewhat misleadingly) that a "hearing" was held on the vexatious litigant motion, but it plainly was not an evidentiary hearing. What happened instead is this: The judge spent the first half of the hearing berating Molski and his lawyers, in pretty much the same terms as his subsequent order – which suggests that his views were cast in cement by the time of the "hearing." *Compare* Excerpts of Record (ER) 1094 ("After examining plaintiff's extensive collection of lawsuits. . . ."), *and* ER 1097 ("The Court simply does not believe that Molski suffered 13 identical injuries generally to the same part of his body, in the course of performing the

same activity, over a five-day period."), *with Mandarin Touch Restaurant,* 347 F.Supp.2d at 864 ("After examining Plaintiff's extensive collection of law suits. . . ."), *and id.* at 865 ("The Court simply does not believe that Molski suffered 13 nearly identical injuries, generally to the same part of his body, in the course of performing the same activity, over a five-day period."). After the judge was done, Molski's counsel was allowed to address the court, ER 1102-06, but no witnesses testified, no evidence was presented, there was no cross-examination and there were no evidentiary rulings – in short, there was no trial. Molski, whose veracity the district court impugned, was not even present.

How then did the judge manage to make factual findings, and how does this panel affirm those findings on appeal? It's bad enough that the panel relies on its own armchair wisdom about plaintiff's supposed ability to avoid repetitive injuries, *Evergreen Dynasty,* 500 F.3d at 1059, rather than looking to whether the record supports the findings of the district court. Worse still is that there is no record the panel could consult if it were of a mind to do so. There is no statement at all from Molski himself, as the complaint is not verified. The panel does not find the absence of an evidentiary record remarkable, perhaps laboring under the mistaken impression that there must be an evidentiary record somewhere under all that paper. Still and all, those of us unfamiliar with the alchemy of making findings based on no evidence – and affirming them based on no record – would

dearly love to know why the absence of an evidentiary record is not an insuperable obstacle to affirming a district court's factual finding.

The bottom line is this: The district court made, and the panel affirms, a finding that Molski is a liar and a bit of a thief, without any evidence at all. The district court and the panel also manage to find that plaintiff just couldn't have suffered the injuries he alleges, without the benefit of an expert or any other proof. But does the district court have authority to make findings that severely curtail access to the federal court, not only for plaintiff but also for his lawyers and their other clients (present and future), without swearing in a single witness? Without giving notice and an opportunity to present evidence? Without cross-examination? Without any of the other rudiments of due process? Isn't Molski at least entitled to get on the stand, look the judge in the eye and tell his story?

Fortunately, there's a cure. The lawyers and judges of the Central District don't have to put up with this kind of tyranny by one judge acting entirely on his own. A member of a multi-judge court should not be able to single-handedly cut off one party or law firm's access to all the other judges of the court. The Central District judges can and should adopt a local rule or general order that any judge wishing to bar a litigant or a law firm from accessing the court must obtain the concurrence of a committee of his colleagues. Enforcement of the order, too, should not be entrusted to the judge who entered it, as he may take

an unduly broad view as to its scope. Far wiser, and fairer, to have other judges, drawn at random, enforce the order in future cases.

By adopting such measures, the court would ensure that draconian orders such as this one will not be the handiwork of a single judge, subject only to cursory supervision by the court of appeals, but a shared responsibility of the court's judges, as such orders should be. And the new local rule or general order should be applied retroactively to Molski's case.

Like Judge Berzon, I'm very sorry that such an order was ever entered, and on such a non-existent record. I'm even sorrier that our panel has seen fit to affirm it, and that our full court has chosen to look the other way. But ultimately, it's up to the judges of the Central District to ensure that due process is upheld and that an injustice is avoided. I have every confidence that they will be equal to the task.
